Entered

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY J. WALKER,

Plaintiff,

vs.

AMERICAN STATE BANK, et al.,

Defendants.

No. 85-C-417-E

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ORDER

NOW on this 19th day of December, 1986 comes on for hearing the above styled case and the Court, being fully advised in the premises finds:

Pretrial order in this case was ordered submitted on or before November 11, 1986 by Scheduling Order at initial status conference on July 31, 1985 at which counsel for Plaintiff was present. On December 15, 1986 this Court by minute order further directed submission of pretrial order by noon on December 16, 1986 and counsel was contacted by telephone and advised of that order.

To date, no pretrial order has been submitted.

IT IS THEREFORE ORDERED that the case be dismissed for failure to comply with a direct order of this Court pursuant to Federal Rules of Civil Procedure, Rule 16(f).

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOCAL 798 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO AND THE BOARD OF TRUSTEES OF THE PIPELINE INDUSTRY BENEFIT FUND,	)	
Plaintiffs,	)	
v.	)	No. 85-C-728-C
PIPELINE CONTRACTORS, INC.,	)	
Defendants.	)	

ORDER DISMISSING COMPLAINT
AND COUNTERCLAIM WITH PREJUDICE

This matter comes on before this Court on this 18 day of December, 1986. The Court finds that the parties have jointly stipulated that the Complaint and Counterclaim should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Complaint of Local 798 and the Pipeline Industry Benefit Fund is dismissed with prejudice and the Counterclaim of Pipeline Contractors, Inc., is dismissed with prejudice. Each side shall bear its own fees and costs.

H. Dale Cook
Judge of the District Court

Entered

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VIDEO COMMUNICATIONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 85-C-299(2)-C
	)	
HOUSTON CLAY PRODUCTS, INC.,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

Now on this 18 day of June, 1986 upon the stipulation of all parties that the issues raised in the above captioned case have been resolved, the court finds that the case should be dismissed.

It is therefore ordered that the above captioned case be dismissed with prejudice. H.W.O.

H. Dale Cook
UNITED STATES DISTRICT COURT JUDGE

163-011:120486:rb

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IBC/INTEGRATED BUSINESS COMPUTERS, INC.,	)	
Plaintiff,	)	
vs.	)	CASE NO. 86-C-807-C
PHYSICIANS DIGITAL RESOURCES, INC.; JOSEPH E. LEVY; THERESA SARHAN-LEVY; and RANDALL MARRS,	)	
Defendants.	)	

JOINT STIPULATION OF DISMISSAL

COME NOW the parties, and hereby jointly stipulate and agree that Plaintiff's Petition and all causes of action contained therein are dismissed with prejudice, with each party to bear its own attorney fees and costs.

Mark G. Kachigian

MARK G. KACHIGIAN, Attorney for
IBC/INTEGRATED BUSINESS COMPUTERS, INC.

Stephen R Clark

STEPHEN R. CLARK, Attorney for
PHYSICIANS DIGITAL RESOURCES, INC.,
JOSEPH E. LEVY, THERESA SARHAN-LEVY,
and RANDALL MARRS

entered.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LINDA S. WALKER, Plaintiff,	)	
vs.	)	No. 84-C-955-C
STATE OF OKLAHOMA, ex rel., et al., Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Came on for consideration this 19 day of December, 1986, the Joint Stipulation of Dismissal signed by all parties to this action, which dismisses with prejudice the above styled and numbered case, and for good cause shown,

IT IS HEREBY ORDERED that this matter be, and hereby is, dismissed with prejudice.

s/H. DALE COOK

United States District Judge

Retired

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EMPIRE FIRE AND MARINE INSURANCE COMPANY,	)	
Plaintiff,	)	
vs.	)	No. 85-C-713-C
GUARANTY NATIONAL INSURANCE COMPANY,	)	
Defendant.	)	

O R D E R

Now before the Court for its consideration are the cross motions for summary judgment filed by the parties. Both parties assert that no controverted facts exist which would defeat summary judgment in their favor. The Court held an evidentiary hearing on the matter on September 25, 1986, and the parties thereafter filed supplemental briefs in support of their positions.

This is a dispute between two insurance companies as to which of their policies afford primary coverage regarding an accident which occurred on June 27, 1984. Jennings Trucking Service, Inc. (Jennings) is an interstate motor carrier licensed by the Interstate Commerce Commission. Guaranty National Insurance Company (Guaranty) writes coverage for Jennings. Kris Knaus has an independent trucking company which leases trucks and drivers to carriers, like Jennings, for hauling goods over routes

authorized by I.C.C. for travel. Empire Fire and Marine Insurance Company (Empire) writes coverage for Knaus.

On March 3, 1982 Jennings and Knaus entered into a written agreement whereby the contractor (Knaus) supplied a truck and driver to transport goods and commodities supplied by the carrier (Jennings), in consideration of Jennings' paying Knaus a percentage of the gross revenues derived from each trip. Knaus supplied Jennings with a Mack truck and a driver by the name of Billy Bellamy. On June 27, 1984, Bellamy telephoned Jennings' dispatcher to ask if a hauling job was available. The dispatcher did not have a job available so Bellamy drove to Jennings' yard to await being called on a job. In route to the dispatch yard Bellamy was involved in an accident near Apache, Oklahoma with an automobile driven by Christopher Gallagher. As a result of the accident, Gallagher was killed. Following the accident, Empire determined that Guaranty was the primary carrier of coverage for the accident and made demand upon Guaranty to assume the defense. Guaranty independently determined its policy was not applicable to the accident and refused to participate in the defense or settlement. After Guaranty refused its coverage, Empire negotiated a settlement of the claim for the death of Gallagher by agreeing to pay $158,565.71. Empire brought suit against Guaranty, asserting that Guaranty is the primary insurer and seeks recovery of the $158,565.71 paid to Gallagher's estate.

The parties stipulate that the Mack truck involved in the collision is owned by Knaus and that Bellamy, the driver, is an employee of Knaus. The agreement entered into between Knaus and

Jennings provided that Knaus was to carry bobtail and deadhead insurance coverage with respect to public liability and property damage. Knaus agreed to provide, maintain and operate the truck, and to hire and supervise the driver. Jennings was to maintain public liability, property damage and cargo insurance coverage and all other such documents required by the Rules and Regulations of the Interstate Corporation Commission, the Department of Transportation, the Oklahoma Corporation Commission or other governmental agencies. Further, Knaus agreed to indemnify Jennings for any loss or damage to third persons or property which resulted from the operations of Knaus, its agents or employees.

The case of Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983) is controlling under this factual setting. In Rodriguez the Tenth Circuit held that common carriers, such as Jennings, who are licensed by the Interstate Commerce Commission are liable as a matter of law under ICC regulations for injuries resulting from collisions between automobiles driven by third parties and trucks commissioned by the ICC certified carrier. The court opined that this liability attaches even though the truck driver was not on a mission for the carrier and even if the carrier was unaware of the fact that the truck was being used in the way it was at the time of the accident. Under the holding of Rodriguez v. Ager, Jennings' insurance carrier, Guaranty National, provides primary coverage for the accident occurring on June 27, 1984.

Therefore the Court grants Empire's motion for summary judgment in finding defendant, as an interstate motor carrier

licensed by the I.C.C., is the primary insurance carrier to afford coverage for the accident, as a matter of law. Empire is entitled to judgment over and against Guaranty in the sum of $158,565.71 plus its costs.

The Court will however note that in Rodriguez, the Tenth Circuit cited Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 423 U.S. 28 (1975), wherein the Supreme Court specifically approved indemnification clauses in contracts between carriers and contractors, under the circumstances where equity dictates that the contractor is primarily responsible for the condition of the truck rather than the carrier. As stated by the court:

> Although one party is required by law to have control and responsibility for conditions of the vehicle and to bear the consequences of any negligence, the party responsible in law to the injured or damaged person may seek indemnity from the party responsible in fact. The indemnification agreement violates the Commission rules only if accompanied by other indicia demonstrating that the lessor was in control of the service provided as well as of the physical operation of the vehicle. But the clause in isolation -- as framed by the issue before the district court on the motion for summary judgment, and before the court of appeals and now before us -- does not do so.

Under the factual circumstances of the case sub judice in reviewing the terms of the agreement entered into between Knaus and Jennings, the Court observes that the indemnification clause may be valid and controlling. Within the language of Transamerican Freight Lines, Jennings, as a certified ICC carrier, is responsible for liabilities arising out of the June 27, 1984 accident, as a matter of law. However, Knaus, as contractor, under the

agreement retained the control and responsibility for the condition of the vehicle and expressly agreed to indemnify Jennings against injury to third parties. Knaus may therefore be responsible, as a matter of fact, for any liability resulting from the June 27, 1984 accident.

Although Guaranty National in its briefs argues the Court should enforce the indemnification agreement, there is no showing in the record that Jennings, as a party to the agreement, brought a third-party action seeking indemnification and consequently the issue is not before the Court nor properly raised in the pleadings. Under the circumstances the Court cannot and will not make findings or conclusions regarding the legal significance of the indemnification clause contained in the separate agreement entered into between Jennings and Knaus.

WHEREFORE, premises considered, it is the Order of the Court that the motion for summary judgment filed by the plaintiff Empire Fire and Marine Insurance Company over and against Guaranty National Insurance Company is hereby granted. Empire Fire and Marine Insurance Company is entitled to judgment in the sum of $158,565.71.

IT IS SO ORDERED this 19th day of December, 1986.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MILDRED NELSON Plaintiff, v. BANK OF OKLAHOMA and SAM HAYES, individually and as President of the Bank of Oklahoma Defendants.	)	Civil Action No. 85-C-306E Judge Ellison

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the parties in the above-captioned action hereby stipulate to a dismissal with prejudice of Plaintiff's Complaint since the parties have executed a settlement and release. Each party is to bear its own costs.

David A. Copus
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Fifth Floor
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 463-2400

Patricia Anne O'Kane
PATRICIA ANNE O'KANE, P.C.
3212 Smith, Suite 102
Houston, Texas 77006
(713) 526-7911

Attorney for Plaintiff

James S. Boese
ROBINSON, BOESE, ORBISON & LEWIS
P. O. Box 1046
Tulsa, Oklahoma 74101

Attorneys for Defendants

S/ JAMES O. ELLISON

Approved: DEC 1 1986
United States District Judge

Dated: _____

Closes as to Cantrell only

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ARTHUR SULENSKI, SUSAN SULENSKI, DANIEL SULENSKI and DAVID SULENSKI, Plaintiffs,	)	
v.	)	No. 85-C-826-C
HOWELL COUNTY, HOWELL COUNTY PROSECUTOR, J. B. CANTRELL, d/b/a CANTRELL HOME FURNISHINGS, CHARLES C. CANTRELL and HOWELL-OREGON ELECTRIC COOPERATIVE, INC., Defendants.	)	

FILED
IN OPEN COURT

DEC 19 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

The Court having been advised that the Plaintiffs' action against the Defendant, Charles C. Cantrell, having been settled between the parties, finds that the action against Charles C. Cantrell should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiffs' action against the Defendant, Charles C. Cantrell, is dismissed with prejudice. The Court retains jurisdiction of the action of the Plaintiffs against the Defendant, Howell County.

Dated this 19th day of December, 1986.

H. Dale Cook

Judge of the United States District Court

Entered

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARGARITA M. VILLA, Plaintiff,	)	
vs.	)	No. 84-C-942-E
THE CITY OF TULSA, OKLAHOMA, an Oklahoma Municipal corporation, et al., Defendants.	)	

O R D E R

NOW on this 18th day of November, 1986 comes on for hearing the above captioned matter and the Court, being fully advised in the premises finds:

Defendant Mindy Wolfe filed motion for judgment notwithstanding the verdict on punitive damages, remittitur or new trial in which she states that the introduction of internal affairs reports and testimony regarding citizen complaints was so prejudicial that no admonishment by the Court could have served to cure its effects. Specifically Defendant refers to statements of opposing counsel at closing argument referring to Defendant Mindy Wolfe as "the ticking time bomb of the booking area". Defendant submits the case of Carter v. District of Columbia, et al., 795 F.2d 116 (D.C. Cir. 1986) in support of her position.

Plaintiff urges the introduction of testimony was proper and that the characterization made during closing argument was a fair inference drawn from the testimony. Plaintiff states that even if there was prejudice from the statement the error was waived by

1.C

failure to timely object. Finally Plaintiff urges that any prejudice resulting from the statement was cured by the Court's instruction that prior complaints against the Defendant should not be considered in determining the liability in this case. Plaintiff states that the holding in Carter is distinguishable from the case at bar in that no newspaper articles or unadjudicated complaints involving officers other than the individual Defendants in this case was introduced and urges that the Carter decision in fact supports the position taken by this Court.

The Court has reviewed the authorities submitted on behalf of both parties and finds Defendant's motion should be denied. The Court carefully weighed the evidentiary question of admission of the prior incident reports in connection with Plaintiff's claim against the now dismissed City and gave a curative instruction after the City's dismissal as to how the incident reports were to be considered. The Court notes that all but one of the incidents were resolved in Defendant's favor. The award of both compensatory and punitive damages in this case was supported by the evidence and the jury carefully deliberated over the Court's instructions.

Plaintiff also filed motion for judgment notwithstanding the verdict or in the alternative for new trial as to the Defendants City of Tulsa and C. S. Walton, stating that the Court erred in refusing to permit the Plaintiff to introduce as evidence the internal affairs files regarding complaints on Officer Mindy Wolfe at the time of trial and that the Court erred in denying

Plaintiff's offer of proof regarding the internal affairs files which were placed in an envelope and marked "Plaintiff's Exhibit 53."

Plaintiff further urges the Court erred in sustaining the motion for directed verdict as to the City of Tulsa at the conclusion of the evidence and further erred in imposing too stringent a standard of proof under the applicable legal authorities. The internal affairs files were the subject of a motion in limine at the beginning of the trial which was sustained. In support of her position as to the various grounds urged, Plaintiff cites those cases which were relied upon by the trial court during the course of the trial in support of its rulings. The Court has reviewed the authorities again and finds no basis to deviate from the decisions previously entered.

IT IS THEREFORE ORDERED that Defendant Mindy Wolfe's motion for judgment notwithstanding the verdict on punitive damages, remittitur or new trial is denied; Plaintiff's motion for judgment notwithstanding the verdict, or alternatively for new trial as to Defendants, City of Tulsa and C. S. Walton, is denied.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

1173.007:ALFORD1:PJW

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 18 1986

Jack C. Silver
U.S. DISTRICT CLERK

FIRST BANK OF GROVE, Grove, Oklahoma, now BANK OF OKLAHOMA, GROVE, a banking corporation; DELAWARE COUNTY BANK, Jay, Oklahoma, a banking corporation; and GRAND SAVINGS & LOAN ASSOCIATION, Jay, Oklahoma, now GRAND FEDERAL SAVINGS BANK, a banking corporation,	)	
Plaintiffs,	)	
vs.	)	No. 85-C-1122E
CAL W. ALFORD, THELMA MAE ALFORD, JAMES J. HOPPER, ANNE CHRISTINE HOPPER, RALPH L. MARTIN and PATRICIA V. MARTIN,	)	
Defendants.	)	

ORDER

For good cause shown, the Advice of Settlement/Dismissal with Prejudice filed herein by the Plaintiffs on the 16th day of December, 1986, dismissing the instant action with prejudice to further filing is hereby accepted and approved; and further, that the Order of Sale dated the 17th day of September, 1986, should be withdrawn; and it is therefore,

ORDERED that the above styled and numbered action be and it is dismissed with prejudice to further filing;

FURTHER ORDERED, that the Order of Sale dated the 17th day of September, 1986, be and is hereby withdrawn.

DATED: December 17, 1986.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

SEIGEL AND OAKLEY

By: _____
Stephen L. Oakley, Esq.
500 West 7th Street, #250
Tulsa, Oklahoma 74119

Kenneth D. David, Esq.
P. O. Box 609
Coffeyville, Kansas 67337

ATTORNEYS FOR DEFENDANTS

HERROLD, GREGG & HERROLD, INC.

By: _____
Donald E. Herrold OBA #4140
1719 East 71st Street
Tulsa, Oklahoma 74136

and

Gene Davis, Esq.
DAVIS & THOMPSON
P.O. Box Drawer 487
Jay, Oklahoma 73150

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE AMERICAN GENERAL FIRE & CASUALTY COMPANY, a Texas corporation,

Plaintiff,

vs.

No. 85-C-1066-B

WILEY ELECTRIC, INC., an Oklahoma corporation,

Defendant.

ORDER

UPON the Joint Application and Stipulation of the Plaintiff and Defendant and each of them, to dismiss the Complaint herein with prejudice, and for good cause shown the Court finds that:

1. The Plaintiff's Complaint filed herein should be dismissed by stipulation pursuant to the provisions of Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

2. That said Dismissal is with prejudice and does operate as an adjudication upon the merits of the causes of action contained in said Complaint, and that each party is responsible for its own attorney's fees and costs incurred herein.

IT IS THEREFORE ORDERED BY THE COURT that the above styled and captioned cause should be and the same is dismissed with prejudice and that the parties herein are responsible for the payment of their own attorney's fees and costs incurred.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 18 1986

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

UTICA NATIONAL BANK & TRUST CO., a national banking association,

Pl.

vs.

CALVIN R (Closed as to Δ David Edlund)

No. 85-C-537-C

STIPULATION OF DISMISSAL

PURSUANT to the provisions of Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto agree that Plaintiff's claims against David J. Edlund asserted herein are hereby dismissed with prejudice, each party to bear its/his own costs incurred herein.

This dismissal shall have no effect on any other claims made against any other Defendant herein.

DATED this 15th day of ~~October~~ December, 1986.

Charles V. Wheeler
GABLE & GOTWALS
2000 Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201

ATTORNEYS FOR PLAINTIFF
UTICA NATIONAL BANK & TRUST CO.

~~Thomas H. Dalik~~ Katie J. Colopy
FITZGERALD, BROWN, LEAHY, STROM,
SCHORR & BARMETTLER
1000 Woodmen Tower
Omaha, Nebraska 68102

ATTORNEYS FOR DEFENDANT
DAVID J. EDLUND

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 18 1986

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

ROBIN KYLE,

Plaintiff,

vs.

GENE WILLIAMS, and individual, and DEE WILLIAMS and OSCAR WILLIAMS, d/b/a DEE'S TYPING SERVICE,

Defendants.

Case No. 86-C-697-B

STIPULATION OF DISMISSAL
WITH PREJUDICE

COMES NOW Plaintiff, Robin Kyle, and Defendants, Gene Williams, Dee Williams and Oscar Williams, d/b/a Dee's Typing Service, to this matter, and pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, hereby stipulate that the instant action and claims will be dismissed as to Defendant, Gene Williams, with prejudice, all parties concerned to pay their respective attorney's fees and costs.

WHEREFORE, the parties request the Court to enter an Order dismissing with prejudice Plaintiff's claims against Defendant, Gene Williams.

John P. Luther, Esq.
3311 East 30th Street
Tulsa, OK 74114

Attorney for Plaintiff

Robin Kyle
5013 North Cincinnati Place
Tulsa, OK 74126

Plaintiff

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By: _____

Charles S. Plumb
1000 Atlas Life Building
Tulsa, OK 74103
918/582-1211

Attorneys for Defendants

Entered

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN ZINK COMPANY, Plaintiff,	)	
vs.	)	No. 85-C-292-C
ZINKCO, INC., and JOHN SMITH ZINK, Defendants.	)	

J U D G M E N T

This matter having come before the Court for nonjury trial and the issues having been duly considered, and a decision having been duly rendered in accordance with the Findings of Fact and Conclusions of Law entered this same date,

IT IS ORDERED AND ADJUDGED that the plaintiff John Zink Company is entitled to judgment against the defendants Zinkco, Inc. and John S. Zink on plaintiff's claim for violation of the federal trademark laws.

IT IS SO ORDERED this 18th day of December, 1986.

H. DALE COOK
Chief Judge, U. S. District Court

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JUDITH E. WARDLOW,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-886-B

APPLICATION FOR
ENTRY OF DEFAULT JUDGMENT

COMES NOW the Plaintiff by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and would show that Defendant, Judith E. Wardlow, acknowledged receipt of Summons and Complaint on October 17, 1986. The time within which the Defendant could have answered or otherwise moved has expired and has not been extended. The Defendant, Judith E. Wardlow, has not answered or otherwise moved and default has therefore been duly entered.

The Plaintiff, United States of America, would further show that the Defendant is indebted to it for the amounts shown in the accompanying Affidavit, and that Plaintiff is entitled to judgment in those amounts as a matter of law.

WHEREFORE, Plaintiff prays that the Court enter default judgment against the Defendant, Judith E. Wardlow,

pursuant to Rule 55(b)(2) of the Rules of Civil Procedure for the amounts shown in the accompanying Affidavit, and the costs of this action.

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

PETER BERNHARDT
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
BODINE FULSOM,)
)
Defendant.) CIVIL ACTION NO. 86-C-792-B

DEFAULT JUDGMENT

This matter comes on for consideration this 18 day of December, 1986, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Bodine Fulsom, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Bodine Fulsom, acknowledged receipt of Summons and Complaint. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant,

Bodine Fulsom, for the principal sum of $361.34, plus interest at the rate of 9 percent per annum and administrative costs of $.61 per month from May 6, 1985, until judgment, plus interest thereafter at the current legal rate of 5.77 percent per annum until paid, plus costs of this action.

/s/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ALAN T. DAVIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 86-C-342-C
	)	
LOTUS PERFORMANCE CARS, L.P., a New Jersey Limited Partnership; LOTUS CARS LIMITED, a British corporation; and JOHN HOKE & CO., LTD., an Oklahoma corporation,	)	
	)	
Defendants.	)	

NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the ~~Defendant~~ Plaintiff, ALAN T. DAVIS, and by and through his attorney of record, STEVEN E. SMITH, and under Rule 41(a) of the Federal Rules of the Civil Procedure and give notice of the dismissal of this cause, without prejudice, to all party Defendants.

Respectfully submitted,

STEVEN E. SMITH
1201 Fourth Nat'l. Bank Bldg.
Tulsa, OK 74119
(918) 582-4107

CERTIFICATE OF MAILING

I, STEVEN E. SMITH, hereby certify that on the _____ day of December, 1986, I mailed a true and correct copy of the within and foregoing Notice of Dismissal Without Prejudice, with proper postage fully prepaid thereon, to the following:

Charles A. Grissom, Jr.
of BOESCHE, McDERMOTT & ESKRIDGE
800 Oneok Plaza
100 West Fifth Street
Tulsa, OK 74103

Attorney for Defendant, LOTUS PERFORMANCE CARS, L.P.

and

W. David Pardue, Jr.
602 Union Plaza
3030 N.W. Expressway
Oklahoma City, OK 73112

Attorney for Defendant, JOHN HOKE & CO., LTD.

STEVEN E. SMITH

Entered

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 18 1986

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
TRACY J. CARLIN,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-210-C

NOTICE OF DISMISSAL

COMES NOW the United States of America by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Peter Bernhardt, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 18th day of December, 1986.

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

PETER BERNHARDT
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 18th day of December, 1986, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Mr. Tracy J. Carlin, Route 3, Box 2060, Owasso, Oklahoma 74055.

Assistant United States Attorney

Entered

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN ZINK COMPANY,

Plaintiff,

vs.

ZINKCO, INC., and
JOHN SMITH ZINK,

Defendants.

No. 85-C-292-C

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter came on for nonjury trial on September 29 and 30, 1986. Plaintiff John Zink Company brings this action alleging trademark, service mark and trade name infringement, unfair competition and misappropriation of trade secrets under the Trademark Laws of the United States and the statutory and common law of the State of Oklahoma.

Plaintiff alleges that the use of JOHN S. ZINK, JACK ZINK and ZINKCO by defendants as trade names and marks for fuel burners, parts and services, infringes and unfairly competes with plaintiff's trademark rights in the name JOHN ZINK and is likely to cause confusion in the industry. In addition, plaintiff alleges that it has acquired a right to the exclusive use and sale of this product in direct competition with plaintiff.

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Plaintiff also alleges defendants have wrongfully appropriated its trade secrets.

In defense, defendants Zinkco and John Smith Zink deny there has been any confusion in the industry regarding the origin of the products or the use of the names ZINKCO and JOHN ZINK COMPANY. Defendants deny plaintiff has acquired an exclusive use to its burner tip by asserting that all parts of the burner tip are functional and not subject to trademark protection. Defendants further deny they have misappropriated plaintiff's trade secrets by asserting that plaintiff has not properly protected its trade secrets from public dissemination nor properly monitored employees from appropriating confidential materials upon their termination from plaintiff's employment.

The parties have submitted both pre- and post-trial briefs, and the matter is now ready for disposition on the merits. After considering the pleadings, testimony, exhibits admitted at trial, all of the briefs and arguments presented by counsel, applicable caselaw and statutory authority, and being fully advised in the premises, the Court enters the following findings of fact and conclusions of law pursuant to Rule 52(a) F.R.Cv.P.

FINDINGS OF FACT

Parties and Jurisdiction

1. Plaintiff John Zink Company is a Delaware corporation with its principal place of business located at 4401 South Peoria, Tulsa, Oklahoma. It is a wholly-owned subsidiary of the Sunbeam Corporation which is, in turn, owned by Allegheny International.

2. Defendant Zinkco, Inc. is an Oklahoma corporation with its principal place of business in Broken Arrow, Oklahoma.

3. Defendant John Smith Zink is an individual who resides in Osage County, Oklahoma and is president of Zinkco, Inc.

4. The Court has jurisdiction over the subject matter of this action arising under the provisions of the Federal Trademark Laws.

5. Venue is proper within the Northern District of Oklahoma in that the cause of action arose within this judicial district, and it is the residence of the defendants.

Background

6. John Zink Company was founded in 1929 by John Steele Zink, the father of defendant John Smith Zink (hereinafter John S. Zink). Prior to February 1, 1972, John Steele Zink and John S. Zink were the sole shareholders of the John Zink Company. John Steele Zink died in 1973.

7. On February 25, 1972, Sunbeam Corporation acquired all of the outstanding shares of John Zink Company; and the Company became a wholly-owned subsidiary of Sunbeam Corporation. Sunbeam was subsequently acquired by Allegheny International.

8. The consideration given for selling John Zink Company to Sunbeam Corporation was 1,208,447 shares of Sunbeam stock valued at forty million dollars ($40,000,000); of which $11,000,000 represented the sum paid for the physical assets of John Zink Company (plant/equipment) and the remaining $29,000,000 was paid for the trade secrets, trade name, reputation and company potential.

9. As part of Sunbeam's acquisition, by separate written employment agreement dated February 1, 1972, John Zink Company employed defendant John S. Zink as its president and chief executive officer at an annual salary of $100,000. In September or October of 1980, John S. Zink was terminated by the John Zink Company but continued to receive monthly wages through November, 13, 1981. In addition, he used an office and two secretaries, provided off premises by John Zink Company, until December 31, 1981.

10. John Zink Company has two divisions; a heating/air conditioning sales and service division and its largest division, an industrial combustion equipment division which manufactures industrial fuel burners and accompanying replacement parts. John Zink Company has a wide range of customers including those within the refinery, petrochemical, chemical, steel-making, mining, oil and gas, cement and food industries.

11. The Sunbeam Corporation Acquisition Agreement dated February 25, 1972 contained the following representations and warranties by John Steele Zink and John S. Zink:

> A. Defendant John S. Zink represented and warranted that John Zink Co. owned the JOHN ZINK trademark and trade name. (Agreement, §4.22, Schedule F).
>
> B. Defendant John S. Zink did not own any interest in any trademarks used by John Zink Co., including the JOHN ZINK trademark. (Agreement, §5.02).
>
> C. Defendant John S. Zink would do whatever would be necessary or desirable in the opinion of counsel for Sunbeam, to perfect or defend title to the property of John Zink

Co., including the JOHN ZINK trademark and trade name (Agreement §18.00).

D. Defendant John S. Zink would never disclose or utilize his confidential knowledge of the business and affairs of John Zink Co. to or on behalf of any competition of John Zink Co. and would not compete with John Zink Co. for a period of two (2) years after he ceased to be an employee of John Zink Co. (Agreement §20.00).

12. In 1981, John S. Zink acquired Product Manufacturing Company, a contract machine shop. Mr. Zink later changed the company's name to Zeeco. In January 1982, John S. Zink organized Zinkco. Zeeco manufacturers industrial machines and parts for Zinkco, replacement parts for John Zink Company's burners and replacement parts for other companies within the combustion industry. Zinkco sells the burners and parts manufactured by Zeeco.

13. In the summer of 1982, John S. Zink contacted a patent attorney, Paul Johnson, seeking advice as to whether he could use his own name to compete with the John Zink Company. The attorney advised against it.

14. Zinkco has employed several former key employees of John Zink Company. These include, among others:

John S. Zink:
former president and chief executive officer of John Zink Company, now serving as president of Zinkco.

Thomas Butchko:
former design engineer and manufacturing manager for 5½ years with John Zink Company, has served for six years as general manager of Zinkco.

David Surbey:
former burner sales manager for 8 years with John Zink Company, has served for two years as vice

president of Zinkco.

Richard Allen:
former lead drafter in the burner division with John Zink Company; has served for a year as senior drafter for Zinkco.

Elmer Willis:
former shop foreman in the manufacturing division of John Zink Company. Former drafting engineer with Zinkco.

Zeeco workforce averages 10 to 12 employees, Zinkco averages 3 to 4 employees. In April 1984, Zinkco was making less than $2,500 annually from sales of burner replacement parts, and less than $5,000 annually from the sale of burners. By 1986 sales from burner parts has increased to approximately $10,000 annually, and burner sales have increased to approximately $125,000 annually.

Trade Name Infringement

15. For over four decades John Zink Company has been engaged in the business of manufacturing distributing, promoting, selling and servicing various combustion equipment products, including fuel burners and fuel burner parts. For over four decades John Zink Company has marketed, in interstate commerce, its fuel burner products and services under its trade names ZINK and JOHN ZINK. The use by the John Zink Company of the names and marks ZINK and JOHN ZINK is well known in the industrial trade market.

16. John Zink Company registered its trademark JOHN ZINK in the United States Patent and Trademark Office, registration No. 758,884 dated October 22, 1963 for "gaseous fuel burners and liquid fuel burners and associated parts and component parts of such burners." The John Zink Company was issued a certificate of

renewal of its trademark JOHN ZINK on October 22, 1983. John Zink Company's trademark was not contested within five years of its registration and the Court finds it is incontestable and conclusive evidence of John Zink Company's exclusive right to use its JOHN ZINK mark.

17. Since 1972, the John Zink Company has sold over three hundred million dollars ($300,000,000) worth of its Zink and John Zink products, including burners and replacement parts and services nationally and internationally. The John Zink Company has expended over three million dollars ($3,000,000) in advertising and promoting its products and services under the trade names ZINK and JOHN ZINK. The Court finds by virtue of these extensive sales, advertising and promotion, the marks ZINK and JOHN ZINK have received wide recognition in the industry.

18. From 1970 until 1986 the John Zink Company printed numerous catalogs and brochures in which the names and marks JOHN ZINK COMPANY, ZINK and JOHN ZINK are prominently displayed. Below is a list of captions appearing on the face of these documents:

Zink Thermal Oxidizer Systems
John Zink Process Systems
John Zink Research Furnace
The John Zink PFH Burner
John Zink Venturi Eductor
John Zink Total Engineering For Pollution Control
Zink Linear Relief Gas Oxidizer
The John Zink Co. The Company and Its Products
John Zink Company Pollution Research Division
John Zink Builds Boilers
John Zink PMS Burner
John Zink Company Duct Burners
John Zink Company Offshore Flaring Systems
JZ John Zink Company Multipoint Flaring Systems

The brochures contain informative, as well as promotional, language. An example of promotional language which utilizes both the mark JOHN ZINK COMPANY and ZINK is as follows:

> Zink Burners work around the world
> Any combustion system is only as good as the burner. The John Zink Company is the world's largest and most experienced manufacturer of industrial and special application burners. All of the past experience and present technology of the John Zink Company serves as a resource to the Process Systems Division and is the foundation of our leadership in waste combustion techniques. From toxic gases to plastic and aqueous brines to coal, Zink burners provide efficient, stable combustion of waste streams in the refining, petrochemical, metals and general industrial fields.

19. John Zink Company has advertised in the following trade periodicals:

> Chemical Engineering Progress
> 33 Metal Producing
> Hydrocarbon Processing
> Chemical Processing
> Chemical Engineering
> Canadian Chemical Processing
> Oil & Gas Journal

20. Defendants began use of ZINK, JOHN S. ZINK, JACK ZINK and ZINKCO as trade names and marks with full knowledge of John Zink Company's wide use of ZINK and JOHN ZINK and its federally registered trademark. The Court finds that the use of ZINK, JOHN S. ZINK, JACK ZINK, and ZINKCO by defendants is unlawfully similar to the use of ZINK and JOHN ZINK by plaintiff and is likely to cause confusion in the market place. Zinkco, in promotional efforts, has engaged in a mass letter-mailing campaign. The letters date back to 1982 and contain information

which could cause a reasonably prudent purchaser to confuse ZINKCO with the John Zink Company, for example:

> Use of the ZINK name
>
> Listing a Tulsa, Oklahoma post office box, although Zinkco is located in Broken Arrow, Oklahoma.
>
> Reference to a John S. "Jack" Zink owned company.
>
> Signature of Jack Zink, as president.
>
> Reference to an "unlimited testing facility" when factually Zinkco has only one test furnace.
>
> Reference to a John S. "Jack" Zink owned company combined with reference to "nearly 100 years combined experience in the combustion field" when in fact Zinkco has only been in existence since 1982.

The Court finds that such language is likely to cause confusion in the market place by Zinkco's implied association with John Zink Company, thereby causing confusion as to the source of origin of the products offered.

21. Catalogs and brochures printed by Zinkco contain misrepresentations and deceptive association with the John Zink Company, for example:

> Use of the Zink name.
>
> Reference to the "longest design experience".
>
> Reference that "Zinkco has combined experience that exceeds 100 years".
>
> Photographs of the burner tip manufactured by the John Zink Company.

The Court finds that defendants' intent in utilizing the name ZINKCO is for the association value of the mark ZINK and JOHN ZINK and defendants' desire to profit from the association.

22. There exist instances of actual confusion of customers and others. Robert Schwartz, Vice President of John Zink Company, testified regarding a misdirected purchase order from Dow Chemical Company sent to John Zink Company at the Tulsa, Oklahoma address, but intended for Zinkco in response to a solicitation effort by Zinkco. Witnesses for the plaintiff and for the defendants testified to receiving misdirected telephone calls from customers and others. An article appeared in the Tulsa Tribune announcing that John Zink Company intended to build a three million-square-foot plant in Broken Arrow, Oklahoma when, in fact, it was Zinkco's intention. After the announcement in the Tulsa Tribune, the John Zink Company received many letters and phone calls of solicitations and inquiries from contractors and subcontractors desiring to bid on the Zinkco project. Robert Schwartz testified that people in the industry and the Oklahoma area are confused as to who they are dealing with "which Zink is the real Zink".

Zinkco sold a fuel burner to a customer in Madrid, Spain; however, the customer was not satisfied with the project and contacted the John Zink Company. The customer had purchased the product from Zinkco believing it was dealing with the John Zink Company. Reputation and goodwill are marketable assets which were legally conveyed by defendant John Zink for valuable consideration and the Court finds that defendants are now unlawfully

infringing and profiting upon the goodwill and reputation of the John Zink Company.

David Surbey, Vice President of Zinkco, testified that he solicited business from a representative of Dow Chemical. The representative placed an order through the company's purchase agent. The purchase agent, confusing Zinkco with John Zink Company, sent the purchase order to the John Zink Company in Tulsa. After John Zink Company investigated and corrected the misdirected order, it thereafter received a second misdirected order from Dow Chemical. Although one division within a large company may use care in distinguishing Zinkco from John Zink Company, confusion results when orders are placed through other divisions within that same company due to the substantial similarity in names and products.

23. The Court finds Zinkco has infringed upon the trade names and marks of the John Zink Company in that the use of ZINKCO and ZINK by the defendants is likely to and actually has caused confusion or mistake as to the source or origin of the product within the relevant market area.

Exclusive Use of the Burner Tip

24. In the early 1960's, John Zink Company began manufacturing a profitable burner tip. Since 1972, this burner tip has brought in millions of dollars in sales. John Zink Company argues that its design is unique and has not been manufactured by any other combustion machine manufacturing company until Zinkco commenced manufacturing it in the 1980's. Peabody Manufacturing Company was the original designer of the Zink burner tip.

Peabody designed the tip in the 1950's and referred to it as the Bullnose tip. Through evolution, the John Zink Company has improved the effectiveness of the tip.

25. The configuration of the Zink burner tip is distinctive; however, all parts of the burner tip are functional and serve a necessary use in the proper performance of the product. The external threading is used to connect the tip to the main body. The tip slopes upward from the threading to form a seal. The tip contains a six-sided metal piece to accommodate a standard industrial wrench for installation purposes. The end of the tip is rounded which reduces the likelihood of coke nodule formulation and the placement of the holes provides control over the substance released. The Court finds that the Zink burner tip is functional in all its parts and therefore John Zink Company has not established an exclusive right to its use and sale.

26. The Court further finds that although the Zink burner tip has had wide dissemination in the industry and has proven profitable, there was no other evidence offered that the tip has acquired a secondary meaning thereby affording it common law trademark protection.

Trade Secret Infringement

27. John Zink Company's Burner Engineering Guide is a compilation of information used by the company in engineering, manufacturing and designing its burners. It has been created by cumulative design efforts over many years, at great expense, and is a valuable asset of the company. It contains John Zink Company's trade secrets and confidential information.

28. John Zink Company has established extensive security measures for its confidential drawings at its plant and access to the Burner Engineering Guide is restricted. The Guide is issued only to specific individuals. Each individual is given a prepared warning with the Guide that the information it contains is to be kept confidential. The Guide itself contains a cover page warning the materials are confidential. A log is kept at the plant listing individuals who have the Guide at any given time. The Guide is always kept within the physical confines of the John Zink plant. The documents are stamped "shop use only", and "property of John Zink Company". Customers are allowed access to various drawings and information only by agreeing to restrictions on disclosure to others and unauthorized use.

29. The evidence offered at trial disclosed that Zinkco has misappropriated and used the trade secrets of the John Zink Company. Defendants have employed several former employees of John Zink Company who had access to the Guide. Defendant John S. Zink acknowledged he had access to the Guide as well as independent recollection of the data it contained. David Surbey, as a former employee, held a confidential relationship with plaintiff. Mr. Surbey admitted John Zink Company's confidential engineering and design drawings were taken by him when he left its employment. Mr. Surbey further admitted that at least 50 pages of the Guide are currently in the possession of Zinkco.

30. Defendants argue that plaintiff's burner tip was manufactured by them through designs prepared by Elmer Willis and John S. Zink from their independent memory of working with the

product at John Zink Company. Defendants further argue the Zink burner tip could be duplicated by a process known as "reverse engineering". Defendants deny the Zinkco burner tip, which is substantially similar to the John Zink Company's tip, was manufactured from confidential drawings of plaintiff even though those drawings are in defendants' possession.

31. The Court finds defendants have misappropriated the trade secrets of John Zink Company by defendants' use of plaintiff's confidential drawings to design and manufacture plaintiff's burner tip. The Court further finds the evidence unpersuasive that the Zink burner tip was reproduced through reverse engineering. Other manufacturing companies have unsuccessfully attempted to reproduce plaintiff's tip through reverse engineering but the finished product has not been the functional equivalent of the Zink tip. The evidence was persuasive that the proper tolerance allowance could not be copied through reverse engineering.

32. Defendants did not obtain the permission of the plaintiff to manufacture products from plaintiff's confidential Guide, and in fact, plaintiff expressly prohibited it.

CONCLUSIONS OF LAW

Parties and Jurisdiction

1. This Court has jurisdiction by virtue of the fact that this is a civil action arising under the Trademark Laws of the United States, 15 U.S.C. §§1051-1177, jurisdiction being specifically conferred in 15 U.S.C. §1121 and 28 U.S.C. §1338(a).

2. The Court has jurisdiction over any state law claims raised by plaintiff by virtue of the doctrine of pendent jurisdiction.

3. Venue is proper within this judicial district pursuant to 28 U.S.C. §1391.

Trade Name Infringement

4. The name JOHN ZINK was registered as a trademark in 1963 and has become incontestable under 15 U.S.C. §1115(b). John Zink Company's incontestable registration of the JOHN ZINK mark is conclusive evidence of plaintiff's exclusive right to use the registered mark. 15 U.S.C. §1115(b). In Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 105 S.Ct. 658 (1985) the Supreme Court opined that the incontestability provision provides a "means for the registrant to quiet title in the ownership of his mark" and "encourages producers to cultivate the goodwill associated with a particular mark." 105 S.Ct. at 663-664. Since John Zink Company's JOHN ZINK registration is incontestable, plaintiff has the exclusive right to use JOHN ZINK as its name and mark in the burner industry.

5. Infringement of a trade name or mark occurs when the use of a similar mark is likely to cause confusion in the marketplace concerning the source of the different products. 15 U.S.C. §1114(1)(1); see also, Beer Nuts, Inc. v. Clover Club Foods Company, (Bear Nuts I), 711 F.2d 934, 940 (10th Cir. 1983). In determining whether there exists a likelihood of confusion, the Court is to consider the following factors set out in the Restatement of Torts §729 (1938):

> (a) the degree of similarity between the designation and the trade-mark or trade name in
>
> (i) appearance;
> (ii) pronunciation of the words used;
> (iii) verbal translation of the pictures or designs involved;
> (iv) suggestion;
>
> (b) the intent of the actor in adopting the designation;
> (c) the relation in use and manner of marketing between the goods or services marketed by the actor and those marketed by the other;
> (d) the degree of care likely to be exercised by purchasers.

This list is not exhaustive and other variables may be considered depending upon the facts of a particular case. Bear Nuts I, supra at 940. Similarities are to be weighed more heavily than differences, especially when the trademarks are used in vertically identical products. Beer Nuts, Inc. v. Clover Club Foods Co. (Bear Nuts II), slip opinion No. 85-1525 (10th Cir. Nov. 20, 1986). Similarity of marks is tested on three levels: sight, sound and meaning. Each must be considered as it is encountered in the market place and the Court must determine whether the infringing mark would be confusing to the public when singly presented. Beer Nuts I, 711 F.2d at 940-941. As stated by the Tenth Circuit:

> It is not necessary for similarity to go only to the eye or the ear for there to be infringement. The use of a designation which causes confusion because it conveys the same idea, or stimulates the same mental reaction, or has the same meaning is enjoined on the same basis as where the similarity goes to the eye or the ear. Confusion of origin of goods may be caused alone by confusing similarity in the meaning of the designations employed. The whole background of the case must be considered.

In assessing likelihood of confusion, the Court weighs the phonetic and semantic similarities between the names John Zink Company and Zinkco and finds that the similarities outweigh the differences. The right to the names and marks ZINK and JOHN ZINK has clearly been infringed by the defendants' use of the name ZINKCO, and the public has been confused by the similarity. "A trademark is not that which is infringed. What is infringed is the right of the public to be free of confusion and the synonymous right of a trademark owner to control his product's reputation." James Burrough, Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266, 274 (7th Cir. 1976). The test is whether a purchaser generally familiar with the JOHN ZINK mark would be likely upon seeing the name ZINKCO to believe that ZINKCO was in some way related to, or connected or affiliated with, or sponsored by, the John Zink Company. James Burrough, Ltd., supra.

6. "Intent on the part of the alleged infringer to pass off its goods as the product of another raises an inference of likelihood of confusion." Beer Nuts I, 771 F.2d at 941. The evidence revealed that John Zink contacted a patent attorney seeking advice as to whether he could compete with plaintiff by use of his name ZINK. Mr. Zink was obviously cognizant of the success of the Zink name in the burner industry. Mr. Zink's intent was to profit from the use of his name, notwithstanding the fact he voluntarily conveyed the name to plaintiff for valuable consideration. The inference of likelihood of confusion is readily drawn from defendants' deliberate misappropriation of plaintiff's trade name with the purpose of obtaining an economic

advantage of plaintiff's investment and its continuing promotion, sales and advertising. See e.g. Tisch Hotels, Inc. v. Americana Inn, Inc., 350 F.2d 609, 613 (7th Cir. 1965). "Proof that a defendant chose a mark, standing alone, may justify an inference of confusing similarity." Beer Nuts I, 711 F.2d at 941. In Beer Nuts II, supra, the court stated that the inference of intent is especially strong when the parties have had a prior relationship. In listing the factors weighing toward Brew Nuts' intentional infringement on the trade name Beer Nuts, the court explained:

> Beer Nuts' use of its trademark predated by two decades the use of the BREW NUTS trademark. Clover Club distributed BEER NUTS for many years prior to developing BREW NUTS. BEER NUTS is a very successful product. Clover Club cannot deny knowledge of the BEER NUTS trademark and the popularity of the product. Clover Club sells its product in the same market as Beer Nuts. The names of the products are similar. The packages are similar. Clover Club's advertising agency advised against the use of the brew nuts trademark. The combination of these factors makes clear that Clover Club deliberately adopted a mark similar to the BEER NUTS mark.

These same factors are clearly present in the case before this Court. Such a conclusion connotes that John S. Zink deliberately infringed on plaintiff's trade name.

7. The possibility of confusion is enhanced when the products are distributed within the same market area. There is no doubt from the evidence that defendants are in direct competition with plaintiff and that both parties are soliciting sales within the same marketplace. "Because the marks are very similar in many respects, the virtual identity of the products and

marketing methods adds strength to the position that the products are likely to be confused." Beer Nuts II, supra.

8. Additionally, the Court must examine the degree of care with which the public will choose the products in the marketplace. Beer Nuts I, 711 F.2d at 941. The Tenth Circuit provides this test:

> The general impression of the ordinary purchaser, buying under the normally prevalent conditions of the market and giving the attention such purchasers usually give in buying that class of goods, is the touchstone. Beer Nuts II, supra.

It has been said the law is made for the protection of the general public, not experts. "But the mere fact that those ordering a product may be discriminating technicians does not of itself insure against the likelihood of confusion; being skilled in one's own art will not necessarily preclude confusion if the similarity between the marks is too great." Dresser Industries, Inc. v. Heraens Engelhard Vacuum, Inc., 395 F.2d 457, 462 (3rd Cir. 1968).

9. Zinkco's use of the trade name and mark ZINK has resulted in actual confusion in the marketplace and is in violation of 15 U.S.C. §1114(1)(a).

Unfair Competition

10. Defendants' use of statements such as "longest design experience" and "Zinkco has combined experience that exceeds 100 years" in conjunction with the use of the mark ZINK is a deceptive trade practice in violation of 15 U.S.C. §1124 and 78 O.S. §51. As stated by the Third Circuit:

> The function of a trademark is to identify the origin or ownership of the article; the essence of the wrong is the passing off of the goods of one manufacturer or vendor as those of another. The right of the plaintiff must be based upon a wrong which the defendant has done to it by misleading customers as to the origin of the goods sold thus taking away its trade. Such a right is not founded on a bare title to a word or symbol but on a cause of action to prevent deception. In this respect, the common law of trademark is but a part of the broader law of unfair competition. Dresser Industries, supra at 461.

11. The principle underlying unfair trade practice cases is that one manufacturer is palming off his merchandise as that of another, or that he is vending the products of another as his own. Midwest Plastics Corp. v. Protective Closures Co., 285 F.2d 744, 750 (10th Cir. 1960). "In other words, the defendants are under a duty to mark or designate their products so that purchasers exercising ordinary care to discover whose products they are buying will know the truth and not become confused or mistaken." Midwest Plastics, supra.

Exclusive Use of Burner Tip

12. In determining whether a product's design is afforded protection, the primary question before the Court is whether the configuration of the product is "functional". In re Morton-Norwich Products, Inc., 671 F.2d 1332, 1335 (C.C.P.A. 1982). It is well settled that the configuration of an article having utility is not the subject of trademark protection. Id. at 1338. The Restatement of Torts §742, describes a product as functional if it "affects their purpose, action or performance, or the facility or economy of processing, handling or using

them." Under the Restatement, a "feature" of a product is "functional" if it "contributes to" the utility, durability, effectiveness or ease of use, or the efficiency or economy of manufacture of that "feature". Restatement of Torts §742 Comment a.

13. From the evidence adduced at trial the Court finds that every aspect of the Zink burner tip is functional. It has been fine-tuned and perfected over the years to be highly functional and therefore profitable. Nothing about the design of the burner tip is happenstance or arbitrary but, rather, the result of fine engineering. "If the particular feature is an important ingredient in the commercial success of the product, the interests in free competition permits its imitation in the absence of a patent or copyright." Truck Equipment Serv. Co. v. Fruehauf Corp., 536 F.2d 1210, 1217 (8th Cir. 1976).

Trade Secret Infringement

14. A trade secret is

> a formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to gain an economic advantage over competitors who do not know or use it. A trade secret must have a substantial element of secrecy. While it need not be patentable it must contain elements which are unique and, not generally known or used in the trade. Central Plastic Co. v. Goodson, 537 P.2d 330, 333-34 (Okla. 1975). Telex Corp. v. IBM, 510 F.2d 894, 928 (10th Cir. 1975).

The elements a plaintiff must prove to establish that defendants wrongfully appropriated its trade secrets are found in

Black, Sivalls & Bryson, Inc. v. Keystone Steel Fab., 584 F.2d 946, 951 (10th Cir. 1978):

(1) a trade secret existed

(2) defendants acquired the trade secrets through a confidential relationship.

(3) defendants used the trade secrets without authorization from plaintiff.

In CMI Corp. v. Jakob, 209 U.S.P.Q. 233 (W.D.Okla. 1980) the court provided some factors to be considered in determining whether the information in question qualifies as trade secrets:

(1) the extent to which the information is known outside of his business;

(2) the extent to which it is known by employees and others involved in his business;

(3) the extent of measures taken by him [employer] to guard the secrecy of the information;

(4) the value of the information to him and to his competitors;

(5) the amount of effort or money expended by him in developing the information;

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

The Court concludes that plaintiff met the burden of proving each of the essential elements at trial. Further, the evidence substantiates the finding that because of the value of the information, John Zink Company maintained the information with substantial secrecy, and the secret information could only be

public knowledge through the breach of confidential relationships with former employees of the company.

CONCLUSION

To protect John Zink Company and the public from confusion the Court hereby enjoins the use of the names and marks ZINK, JACK ZINK, JOHN ZINK and ZINKCO from being the trade names and marks of defendant Zinkco, Inc. Further, defendant John S. Zink is enjoined from using the name ZINK, JACK ZINK, JOHN ZINK or JOHN S. "JACK" ZINK in any type of competitive sales endeavors in the business of "gaseous fuel burners and liquid fuel burners and associated parts and component parts of such burners.

The Court has determined that plaintiff does not have an exclusive right to use and sell the Zink burner tip. However, it is the further finding of the Court that the materials contained within or derived from the Burner Engineering Guide are the trade secrets of John Zink Company; therefore the defendants are enjoined from using the information contained in or derived from the Burner Engineering Guide. Defendants are Ordered to deliver to the plaintiff all documents in their possession that are copies of matters contained in or derived from plaintiff's Burner Engineering Guide.

The Court hereby denies plaintiff an award of monetary damages. The Court finds that plaintiff abandoned, at trial, its claim for damages in that plaintiff offered no evidence to support its claim.

It is the further Order of the Court that plaintiff is entitled to recover reasonable attorney fees and costs over and

against the defendants. The Court finds this to be an exceptional case as set forth in 15 U.S.C. §1117 in that defendants were deliberately and knowingly trading off the Zink name after having conveyed the rights to that name to plaintiff for valuable consideration.

IT IS SO ORDERED this 18th day of December, 1986.

H. DALE COOK
Chief Judge, U. S. District Court

Entered

DEC 19 1986

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN ZINK COMPANY, Plaintiff,	)	
vs.	)	No. 85-C-292-C
ZINKCO, INC., and JOHN SMITH ZINK, Defendants.	)	

WRIT OF INJUNCTION

This matter having come before the Court for nonjury trial on September 29 and 30, 1986 and the Court on the 18th day of December, 1986 having found the defendants Zinkco, Inc. and John S. Zink guilty of infringing John Zink Company's trade name and trademark JOHN ZINK, as registered in the United States Patent and Trademark Office, No. 758,884 dated October 22, 1963 for "gaseous fuel burners and liquid fuel burners and associated parts of such burners,"

Further, the Court having found defendants Zinkco, Inc. and John S. Zink guilty of misappropriating John Zink Company's trade names and trade secrets and confidential information contained in or derived from the Burner Engineering Guide,

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IT IS THEREFORE ORDERED that defendants Zinkco, Inc. and John S. Zink, their heirs, successors and assigns, and all those now or hereafter in privity, cooperation or participation with them or their heirs, successors or assigns, are PERMANENTLY ENJOINED from the use of the names and marks ZINK, JACK ZINK, JOHN ZINK and ZINKCO from being the trade names and marks of defendant Zinkco, Inc. or John S. Zink,

IT IS FURTHER ORDERED that defendant John S. Zink and his heirs, successors and assigns and all those now or hereafter in privity, cooperation or participation with him or his heirs, successors or assigns, are PERMANENTLY ENJOINED from using the name ZINK, JACK ZINK, JOHN ZINK or JOHN S. "JACK" ZINK in any type of competitive sales endeavors in the business of "gaseous fuel burners and liquid fuel burners and associated parts and component parts of such burners,"

IT IS THE FURTHER ORDER OF THE COURT that defendants Zinkco, Inc. and John S. Zink and their heirs, successors and assigns, and all those now or hereafter in privity, cooperation or participation with them or their heirs, successors or assigns are PERMANENTLY ENJOINED form using the trade secrets and confidential materials contained within or derived from the Burner Engineering Guide and to deliver over to the plaintiff John Zink Company all documents in their possession that are copies of

matters contained in or derived from the John Zink Company's Burner Engineering Guide.

WHEREFORE FAIL YE NOT, under penalty of law and pain of contempt.

IT IS SO ORDERED this 18th day of December, 1986.

H. DALE COOK
Chief Judge, U. S. District Court

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
EMORY R. HENDERSON,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-456-E

NOTICE OF DISMISSAL

COMES NOW the United States of America by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 18th day of December, 1986.

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

Paul Pinnell

PHIL PINNELL
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 18th day of December, 1986, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Emory R. Henderson, 1220 South Beech Court, Broken Arrow, Oklahoma 74012.

Paul Pinnell
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEC 1 8 1986

DYCO PETROLEUM CORPORATION, a corporation,	)	
Plaintiff,	)	
v.	)	Case No. 86-C-897-E
EL PASO NATURAL GAS COMPANY, a corporation,	)	
Defendant.	)	

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Defendant El Paso Natural Gas Company, by and through its attorney of record, Hall, Estill, Hardwick, Gable, Collingsworth & Nelson, and pursuant to Rule 41(c) of the Federal Rules of Civil Procedure, gives notice of the dismissal of its second counterclaim, without prejudice, to Plaintiff Dyco Petroleum Corporation. A responsive pleading has not been served to Defendant's second counterclaim.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,
COLLINGSWORTH & NELSON

By: J. Kevin Hayes
J. Clayton La Grone
Fred S. Nelson
J. Kevin Hayes
Judy A. Johnson

4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, OK 74172
918/588-2700

ATTORNEYS FOR DEFENDANT
EL PASO NATURAL GAS COMPANY

Of Counsel
Donald J. MacIver, Jr.
Senior Vice President and
General Counsel
Eldon J. Mitrisin
Barbara R. Harrell
P.O. Box 1492
El Paso, TX 79978
915/541-2600

COUNSEL FOR EL PASO NATURAL GAS COMPANY

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of December, 1986, a true and correct copy of the above and foregoing Answer was properly mailed to R. K. Pezold, Kenneth L. Brune; Brune, Pezold, Richey & Lewis, 700 Sinclair Building, Six East Fifth Street, Tulsa, Oklahoma 74103.

J. Kevin Hayes

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 17 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STANLEY MORGAN,

Defendant.

CIVIL ACTION NO. 86-C-946-E

DEFAULT JUDGMENT

This matter comes on for consideration this 16th day of December, 1986, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Nancy Nesbitt Blevins, Assistant United States Attorney, and the Defendant, Stanley Morgan, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Stanley Morgan, acknowledged receipt of Summons and Complaint on October 27, 1986. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant,

Stanley Morgan, for the principal sum of $746.70, plus interest at the rate of 12.25 percent per annum and administrative costs of $.68 per month from November 1, 1984, until judgment, plus interest thereafter at the current legal rate of 5.77 percent per annum until paid, plus costs of this action.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DAVID T. SINKUS,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-944-B

DEFAULT JUDGMENT

This matter comes on for consideration this 17th day of December, 1986, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Nancy Nesbitt Blevins, Assistant United States Attorney, and the Defendant, David T. Sinkus, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, David T. Sinkus, acknowledged receipt of Summons and Complaint on October 27, 1986. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant,

David T. Sinkus, for the principal sum of $704.86, plus interest at the rate of 15.05 percent per annum and administrative costs of $.61 per month from September 28, 1983, $.68 per month from January 1, 1984, and $.67 per month from February 1, 1985, until judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus costs of this action.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLARD P. MAYES, Plaintiff,	)	
v.	)	No. 85-C-1127-B
OTIS R. BOWEN, M.D., Secretary of Health and Human Services, Defendant.	)	

ORDER AFFIRMING FINDINGS AND RECOMMENDATIONS OF MAGISTRATE DENYING CLAIMANT'S SOCIAL SECURITY DISABILITY CLAIM

On October 10, 1986, the United States Magistrate, John Leo Wagner, entered his Findings and Recommendations to affirm the defendant Secretary's denial of claimant's social security disability application filed on January 25, 1985. On October 20, 1986, the claimant timely filed his objection to the Magistrate's Findings and Recommendations. In the claimant's objections he states the following:

1. That the Magistrate erreonously found that the plaintiff's prior applications were not reopened;

2. That the Magistrate erred in upholding the A.L.J.'s decision which was based on the grid. That the plaintiff suffers from substantial nonexertional impairments, i.e. pain, stress and mental problems which should be evaluated by a vocational expert;

3. That the Magistrate erred in denying Plaintiff's request for remand pursuant to the new mental regulations; and

4. That the Magistrate erred in holding that this case was distinguished from Weakley v. Heckler, 85-1978 (10th Cir. June 25, 1986).

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The Court has undertaken a thorough and complete review of the record and relevant evidence presented therein and concludes that the Magistrate's Findings and Recommendations should be and are hereby affirmed and adopted.

Supplementing the Magistrate's Findings and Recommendations and commenting specifically on the alleged grounds of error as follows:

The Administrative Law Judge concludes his decision of August 13, 1985 by stating:

> "IT IS THE DECISION of the Administrative Law Judge that, based on the application filed on January 25, 1985, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act."

Plaintiff's current application, filed January 25, 1985, alleges that plaintiff became disabled on September 15, 1984, due to "(1) herniated disc in low back; (2) pressure in neck and back of head; (3) malfunction of right arm; and (4) hernia in right groin."

Claimant contends a finding of reopening of prior applications is crucial in this case because there are unresolved mental allegations in the prior cases which should be evaluated. Claimant asserts that in the observation of the ALJ at the bottom of page 2 of his decision, i.e., "However, all the medical evidence in the file is carefully considered in reaching this decision", there was a de facto reopening of prior applications. Clearly, the ALJ was addressing the alleged physically disabling

allegations in the claimant's application of January 25, 1985. The ALJ's reference to all the medical evidence in the file obviously referred to medical information relevant to the physical conditions set forth in the January 25, 1985 application. No allegation of disabling mental or psychiatric disorder was asserted in the January 25, 1985 application.

The Court's conclusion in this regard is not contrary to the case of Taylor for Peck v. Heckler, 738 F.2d 1112 (10th Cir. 1984). In Taylor, the trial court denied the claimant's petition on a theory of administrative res judicata. Herein, claimant's disability application of January 25, 1985, has been addressed on the merits based upon the medical evidence before the ALJ relating to the claims of physical disability in said application.

The claimant cites the case of Fulton v. Heckler, 760 F.2d 1052, 1055 (10th Cir. 1985), which states:

> "This oft-cited language (substantial evidence) is not a talismanic formula for adjudication; the determination is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence -- particularly certain types of evidence (e.g. that offered by treating physicians) -- or if it really constitutes not evidence but mere conclusions.' ..."

There is substantial evidence in the record to support the ALJ's conclusion "the evidence does not establish a medically determinable basis for the claimant's complaints of pain to the degree of severity alleged." And such evidence is not overwhelmed by other evidence. Therefore, the Magistrate did not

err in upholding the ALJ's decision which was based on the grid and it was not error for the ALJ, based upon the evidence in the record, to fail to find that there were substantial nonexertional impairments, i.e., pain, stress and mental problems, which should be evaluated by a vocational expert.

For the reasons stated in the Magistrate's Findings and Recommendations, as well as this Court's supplement, the Magistrate did not err in denying plaintiff's request for remand pursuant to the new mental regulations.

The denial of disability benefits by the ALJ was not based upon the proposition that claimant refused surgery or that the evidence did not support the four-part test of Weakley v. Heckler, 795 F.2d 64 (10th Cir. 1986). Benefits herein were not denied because of plaintiff's failure to have back surgery, but rather on the substantial evidence in the record, medical and otherwise, that claimant has the residual functional capacity to perform the full range of sedentary work and a wide range of light work (20 C.F.R. §404.1567), even if claimant chose not to have the recommended surgery.

As previously stated, the Findings and Recommendations of the Magistrate upholding the denial of social security benefits to the claimant filed by the Magistrate herein on October 10, 1986, are hereby affirmed.

DATED this 17th day of December, 1986.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK L. SMITH, Plaintiff, v. CITY OF CHELSEA, OKLAHOMA, a municipal corporation; MAYOR GUS ROBINSON; City councilmen DAVE WATSON, JOE CRUTCHFIELD, and BILL BROCK; POLICE CHIEF SAM STINNETT; and JUDY BALL, Defendants.	No. 85-C-953-B ✓

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby awarded to the defendant, Judy Ball, against the plaintiff, Jack L. Smith, as and for attorney's fees in the sum of One Thousand Nine Hundred Twenty-Five and 50/100 Dollars ($1,925.50), and interest thereon at the rate of 5.77% per annum from this date.

DATED this 17 day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK L. SMITH,

Plaintiff,

v.

CITY OF CHELSEA, OKLAHOMA, a municipal corporation; MAYOR GUS ROBINSON; City councilmen DAVE WATSON, JOE CRUTCHFIELD, and BILL BROCK; POLICE CHIEF SAM STINNETT; and JUDY BALL,

Defendants.

No. 85-C-953-B

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment as and for attorneys fees is hereby awarded the defendants, City of Chelsea, Oklahoma, a municipal corporation, Gus Robinson, Dave Watson, Joe Crutchfield, Bill Brock, and Sam Stinnett, in the total sum of Two Thousand Two Hundred Sixty-Six and 85/100 Dollars ($2,266.85), against the plaintiff, Jack L. Smith, and interest thereon from this date at the rate of 5.77% per annum.

DATED this 17th day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DONALD L. WATTS,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-949-C

DEFAULT JUDGMENT

This matter comes on for consideration this 17 day of December, 1986, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Nancy Nesbitt Blevins, Assistant United States Attorney, and the Defendant, Donald L. Watts, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Donald L. Watts, acknowledged receipt of Summons and Complaint on October 19, 1986. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant,

Donald L. Watts, for the principal sum of $563.64, plus interest at the rate of 9 percent per annum and administrative costs of $.61 per month from February 8, 1985, $.68 per month from January 1, 1984, and $.67 per month from February 1, 1985, until judgment, plus interest thereafter at the current legal rate of 5.77 percent per annum until paid, plus costs of this action.

s/H. DALE COOK

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DONALD K. SMITH,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-892-C

DEFAULT JUDGMENT

This matter comes on for consideration this 17 day of December, 1986, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Donald K. Smith, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Donald K. Smith, acknowledged receipt of Summons and Complaint on October 10, 1986. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant,

Donald K. Smith, for the principal sum of $448.53, plus interest at the rate of 12.25 percent per annum and administrative costs of $.68 per month from July 16, 1984, until judgment, plus interest thereafter at the current legal rate of 5.72 percent per annum until paid, plus costs of this action.

s/H. DALE COOK

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ROBERT D. VIRDEN,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-296-C

AGREED JUDGMENT

This matter comes on for consideration this 17 of November, 1986, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, Robert D. Virden, appearing pro se.

The Court, being fully advised and having examined the file herein, finds that the Defendant, Robert D. Virden, has agreed that he is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against him in the amount of $1,140.83, plus interest at the legal rate from the date of judgment until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Robert D. Virden, in the amount of $1,140.83, plus interest at the current legal rate of 5.77 percent from the date of judgment until paid, plus the costs of this action.

s/H. DALE COOK

UNITED STATES DISTRICT JUDGE

APPROVED:

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

PETER BERNHARDT
Assistant U.S. Attorney

Robert D. Virden

ROBERT D. VIRDEN

FILED

DEC 17 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EL PASO INTERNATIONAL INVESTORS, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 86-C-472-E
KERAMIK HOLDING AG LAUFEN and LAUFEN CERAMICS, INC.,	)	
Defendants.	)	

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this judgment by United States mail upon the attorneys for the parties appearing in this action.

DATED this 16th day of December, 1986.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff, v. BILL R. ESTEP, PHILMORE COX, and JAMES E. PARKER Defendants.	)	No. 86-C-720-C

JOURNAL ENTRY OF JUDGMENT AGAINST DEFENDANT ESTEP

This cause comes on for consideration upon the Application of Plaintiff, Federal Deposit Insurance Corporation, for the entry of a default judgment. The Court hereby finds as follows:

1. The Complaint and Summons in this action were served on the Defendant Bill R. Estep, on August 18, 1986, by certified mail return receipt requested.

2. The time within which the Defendant, Bill R. Estep may answer or otherwise plead has expired.

3. The Defendant, Bill R. Estep has totally failed to answer or otherwise plead and this Court has not extended the time for the Defendant, Bill R. Estep to answer or otherwise plead.

4. On or about April 8, 1982 Peb Oil and Gas Inc., executed and delivered to Oklahoma National Bank ("ONB") a promissory note in the principal amount of $51,000.

5. The note is in default and PEB Oil and Gas, Inc. is currently indebted thereon in the principal sum of $51,000 plus accrued interest to November 30, 1986 of $32,467.17 plus interest accruing thereafter at the rate of $14.17 per diem, plus costs of this action and attorneys' fees.

6. On or about March 25, 1982, for value received and for the purpose of enabling PEB Oil and Gas, Inc. to obtain credit on other financial accommodations from

ONB, Defendant Bill R. Estep executed and delivered to ONB an unconditional unlimited guaranty of all indebtedness of PEB Oil and Gas, Inc. to ONB then in existence or thereafter arising.

7. The Federal Deposit Insurance Corporation is now the owner and holder of the promissory note and the guaranty.

8. By virtue of the guaranty, Defendant Bill R. Estep is liable for all sums due on the promissory note.

THEREFORE, IT IS ORDERED ADJUDGED AND DECREED that the Plaintiff, Federal Deposit Insurance Corporation, shall have judgment against Defendant, Bill R. Estep, in the principal sum of $51,000, plus accrued interest as of November 30, 1986 of $32,467.17 which represents principal and plus interest at the rate of $14.17 per diem from November 30, 1986 plus a reasonable attorneys' fee, plus the costs in this action.

s/H. DALE COOK

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN SAPP,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-258-E

NOTICE OF DISMISSAL

COMES NOW the United States of America by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 17th day of December, 1986.

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

Phil Pinnell

PHIL PINNELL
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of December, 1986, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: John Sapp, Rural Route 3, Box 76, Colcord, Oklahoma 74338

Phil Pinnell
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 17 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN RE:	)	
	)	
REPUBLIC FINANCIAL CORPORATION, an Oklahoma corporation, Debtor, JERRY L. MIZE d/b/a GRANDEZA RANCH AND CAROLE N. MIZE,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 86-C-144-E
	)	
R. DOBIE LANGENKAMP, Successor Trustee,	)	
	)	
Appellee.	)	

O R D E R

NOW on this 16th day of December, 1986 comes on for hearing the above styled case and the Court, being fully advised in the premises finds:

This case is an appeal by Jerry L. and Carole N. Mize from an order of the United States Bankruptcy Court for the Northern Distrit of Oklahoma disallowing their claims against the Republic Financial Corporation bankrupt estate ("Republic"). The Mizes filed their first proof of claim on September 25, 1984. The amount of that claim was $7,797,821.44. The next day, on September 26, 1984, the Mizes amended the original claim twice. The first amended claim as in the amount of $1,809,596.36 and was allegedly for rents and interest owed to the Mizes because of Republic's possession of the Mizes' ranch known as the "Grandeza". The second amended claim was in the amount of $6,508,225.08 and claimed tort damages resulting from Republic's

possession of the ranch. The total amount claimed on the two amended proofs of claim was $8,317,821.44. The difference in amounts between the first and second amended claims and the original claim is $52,000.00. This difference occurs because of an addition error in the first amended proof of claim. The total actually claimed is $7,797,821.44. The claims and amounts on the amended proofs of claim are identical to the original proof of claim. The order from which the Mizes appeal followed a lengthy claim estimation hearing held on February 14, 1986 in which the Bankruptcy Court determined that the value of Mizes' claims was zero.

This case comes before the Court on appeal after a lengthy and complex history of disputes between the Mizes and Republic. The case of Republic Financial Corporation v. Mize, 682 P.2d 207 (Okla. 1983) contains a complete account of the dispute between the Mizes and Republic over the ranch in dispute. This Court need not address the ruling of the Oklahoma Supreme Court in that case regarding the ownership of the ranch. Rather, this appeal concerns contingent and unliquidated tort claims and accounting disputes filed by the Mizes against the bankruptcy estate.

The Mizes first allege that the Bankruptcy Court did not have the constitutional authority or jurisdiction to conduct the February 14, 1986 claim estimation hearing. The Mizes base this claim upon an allegation that the claim estimation hearing was not a core proceeding and additionally could not be conducted as a summary adjudication. The Mizes allege that the hearing was not a core proceeding because the claims constitued pending state

court claims and were thus related non-core proceedings.

The Bankruptcy Court correctly determined that the claim estimation hearing was a core proceeding and that the Court has jurisdiction to conduct the hearing. 28 U.S.C. § 157(b)(1) grants the Bankruptcy Court jurisdiction to hear and determine all core proceedings arising under Title 11 or arising in a case under Title 11 and authorizes the Bankruptcy Court to enter appropriate orders and judgments in such core proceedings. Core proceedings include, but are not limited to: matters concerning the administration of the estate, 28 U.S.C. § 157(b)(2)(A); allowance or disallowance of claims against the estate, and estimation of claims or interest for purposes of confirming a plan under Chapter 11 of Title 11, Id., § 157(b)(2)(B); and counterclaims by the estate against persons filing claims against the estate, Id., § 157(b)(2)(C). Core proceedings do not include the liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of distribution in a case under Title 11. Id. § 157(b)(2)(O).

Although the claims represented unliquidated damage claims, they were not claims for personal injury or wrongful death and therefore were not excluded from the definition of "core proceeding" by 28 U.S.C. § 157(b)(2)(O).

Further this is not a proceeding which requires trial by jury as urged by Appellants. A Bankruptcy Court is a court of equity and has full power to inquire into the validity of any alleged debt. Gardner v. New Jersey, 329 U.S. 565, 573 (1947).

This power to inquire into the validity of alleged debts is central to the prompt and effective administration of a bankrupt estate. Kathen v. Landy, 382 U.S. 323, 328 (1966). The Supreme Court has stated that this inquiring is to be exercised in "summary proceedings and not by the slower and more expensive processes of a plenary suit." Id.

The estimation of the Mizes claims was essential to the prompt and efficient administration of the estate. Because of the large size of the alleged debt to the Mizes in relation to the entire Republic estate, the correct amount of the claims had to be determined for purposes of voting on the bankruptcy plan. Voting rights on a bankruptcy plan directly affect the administration of the estate. Whether the Mizes had voting rights on the plan could materially alter the outcome of a vote to accept or reject the plan. Requiring this to be litigated through the state courts could take years. If the Bankruptcy Court was required to wait until the Mizes had exhausted all of the possible state court appeals, the administration of the estate would have been severely disrupted. Equity dictates that the Bankruptcy Court may estimate the amount of the claims, and, once having estimated the claims, continue with the orderly administration of the estate.

The Mizes further challenge the jurisdiction of the Bankruptcy Court to summarily disallow claims without a jury allegedly in violation of Article Three of the United States Constitution. The Mizes base this allegation on the United States Supreme Court case Northern Pipeline Const. Co. v.

Marathon Pipe Line Co., 458 U.S. 50 (1982). In Marathon the Court stated that "related proceedings" must be adjudicated by Article III courts, if they are to be adjudicated by any federal court. The Mizes claim that the claim estimation hearing was a "related proceeding" because of pending state court claims, thereby preventing jurisdiction of the Bankruptcy Court.

The Tenth Circuit has addressed Marathon in Matter of Colorado Energy Supply, Inc., 728 F.2d 1238 (10th Cir. 1984). In that case the Court held that allowance and objection to claims against an estate are not "related proceedings." Such proceedings are instead "integral to the administration of a bankruptcy estate" and need not be adjudicated by an Article III court.

This Court has already determined that the hearing for disallowance of claims was a core proceeding and that the Bankruptcy Court did not err in such ruling. As a core proceeding, the hearing need not have been adjudicated by an Article III court. Mizes' claim that the hearing violated Article III is without merit.

The Mizes also claim that the Bankruptcy Court lacked jurisdiction to disallow their claims in a proceeding without a jury because they had incorporated their proof of claim into a counterclaim in a pending adversary proceeding. The Mizes cite no authority for this argument. Mizes essentially claim that one may avoid summary estimation of claims by unilaterally filing a claim in an adversary proceeding. Such a claim is without merit and would avoid the claim estimation procedures of the Bankruptcy

Code. Further, no Seventh Amendment right to a jury trial exists in equitable proceedings of the Bankruptcy Court. Katchem v. Landy, 382 U.S. 323, 336-40 (1966).

Additionally, the Mizes claim that the Bankruptcy Court had no jurisdiction to redetermine Mizes' interest in the ranch in a manner contrary to the Oklahoma Supreme Court's decision in Republic Financial Corp. v. Mize, 682 P.2d 207 (Okla. 1983). The proceeding from which this appeal comes was a claim determination hearing regarding tort claims of the Mizes. The Bankruptcy Court did not redetermine the Mizes' interest in the ranch. Such claims are totally without merit.

The Mizes further allege that the Bankruptcy Court did not have jurisdiction to determine the Mizes' claims without a jury because the following matters were pending: three motions before the Bankruptcy Court, a related adversary proceeding before the Bankruptcy Court, and two pending state court actions.

Regarding the three motions before the Bankruptcy Court, motion to transfer, motion to terminate automatic stay, and motion to abstain, Appellants have failed to designate those items in the record on appeal. Rule of Bankruptcy Procedure 8006 clearly places the burden of designating items for the appeal record upon the appellant. Accordingly this Court will not address the issues raised in this regard.

Regarding the related adversary proceeding, Appellants allege that the very same issues are pending in the adversary proceeding as were dealt with in the claim estimate hearing. Appellants are referring to bankruptcy case Jack D. Jones,

Trustee v. Mize, Case 85-0145. Republic filed the case as an adversary proceeding to determine the distribution of proceeds from the sale of the ranch. Appellants contend that the same issues are pending in that case because they have counterclaimed with the same claims that are the subject of their proofs of claim. Those claims were of course the subject matter of the claim estimation hearing.

The Mizes offer no authority to support their claimed right to a jury trial resulting from their counterclaims in the adversary proceeding. This Court has found no authority to support the Mizes' claim. The Mizes essentially are attempting to avoid the summary estimation procedures of 11 U.S.C. § 502(c) by the unilateral filing in a related proceeding of counterclaim which is identical to their proof of claim. Such a procedure would thwart the policy of efficient claim estimates of §502(c). Accordingly, this Court finds that Appellants' argument is without merit.

Appellants also urge that two pending state court proceedings divest the Bankruptcy Court of jurisdiction. Appellants refer to cases Republic v. Mize, C-80-70 and C-85-97, both filed in the Oklahoma District Court for Osage County. This Court notes case C-80-70, filed by Republic in October, 1980, was the original action regarding the dispute between the Mizes and Republic over the Grandeza ranch. That case was later heard by the Oklahoma Supreme Court on November 15, 1983, Republic v. Mize, 682 P.2d 207 (Okla. 1983). The Oklahoma Supreme Court denied rehearing of the case on April 27, 1984. That case is no

longer "pending." Regarding case no. 85-97, this Court has been provided no information on appeal regarding it and has no information about the case other than that Republic originated it. Since Republic originated the case it is unlikely that it deals with the tort claims that are the subject matter of this appeal. Accordingly, this Court finds that Appellants' claims regarding the "pending" state proceedings are without merit.

Finally, the Mizes claim that the Trustee failed to meet his burden of proof to disallow their claim. This Court finds that the evidence clearly and convincingly shows that the value of Mizes' claims was zero. Further, the Bankruptcy Court did not abuse its discretion in valuing the claims at zero.

This Court has carefully examined the record and can find nothing that shows the judgment of the Bankruptcy Court to be clearly erroneous. The judgment of the Bankruptcy Court is therefore affirmed.

It is so ordered.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 17 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

WILLIAM RICHARD WHITSON, SR., AND SHERYLE WHITSON, individually and as next of kin of William Richard Whitson, Jr.,	)	
Plaintiffs,	)	
vs.	)	No. 85-C-409-E
ST. FRANCIS HOSPITAL, PAUL BISCHOFF, M.D., JAMES DANIEL BAXTER, M.D., JAMES LARSON, M.D., and WILLIAM NEEL BURNS, M.D.,	)	
Defendants.	)	

JUDGMENT

This action came on for hearing before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiffs William Richard Whitson, Sr. and Sheryle Whitson take nothing from the Defendant James Daniel Baxter, M.D., that the action be dismissed on the merits, and that the Defendant James Daniel Baxter, M.D., recover of the Plaintiffs William Richard Whitson, Sr. and Sheryle Whitson his costs of action.

DATED at Tulsa, Oklahoma this 16th day of December, 1986.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LYNN F. CROSS, Plaintiff, v. PHYLLIS and FRANK MESSINA, Defendants.	)	No. 86-C-215-B
LORRI L. CROSS, Plaintiff, v. PHYLLIS and FRANK MESSINA, Defendants.	)	No. 86-C-216-B

J U D G M E N T

In keeping with the verdict of the jury entered this date in the captioned causes, Judgment is hereby entered in favor of the plaintiff Lynn F. Cross in the amount of Three Thousand Five Hundred Five and No/00 Dollars ($3,505.00), and Lorri L. Cross in the amount of One Thousand Two Hundred Twenty-Eight and 80/100 Dollars ($1,228.80), and against the defendants, Phyllis Messina and Frank Messina. Further, it is the determination of the Court the plaintiffs are entitled to liquidated damages from the defendants in an amount equal to said jury awards because the defendants' conduct was lacking in good faith when they failed to comply with the requirements of the Fair Labor Standards Act.

IT IS THEREFORE ORDERED AND ADJUDGED that the judgment awarded Lynn F. Cross against the defendants, Phyllis Messina and Frank Messina, is in the amount of Seven Thousand Ten Dollars ($7,010.00), and the judgment awarded Lorri L. Cross against the defendants, Phyllis Messina and Frank Messina, is in the amount of Two Thousand Four Hundred Fifty Seven and 60/100 Dollars ($2,457.60), plus the costs of this action. Interest is awarded on said sums at the rate of 5.77% per annum. Any attorney's fee award claim of plaintiffs' counsel must be timely filed in keeping with Local Rule 6 of the Rules of the United States District Court for the Northern District of Oklahoma.

DATED this 16th day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAROLD ED BURNETT,

Plaintiff,

vs.

LARRY D. KERR AND THE UNITED STATES OF AMERICA,

Defendants.

No. 86-C-611-E
84-CR-5-01-E

O R D E R

NOW on this 15th day of December, 1986 comes on for hearing the above styled case and the Court, being fully advised in the premises finds:

Plaintiff has filed a writ of habeas corpus under § 2255 asserting he was denied effective assistance of counsel at trial. Burnett states that he was deprived of effective counsel when his court-appointed counsel refused to accept the Court's granting of a motion for a mistrial, failed to submit instructions regarding self-defense, failed to submit instructions regarding voluntary drunkenness, and failed to advise client of his Fifth Amendment right against self-incrimination, and advised him to testify.

Sixth Amendment ineffective counsel claims are controlled by Strickland v. Washington, 446 U.S. 668, 104 S.Ct. 2065 (1984). In this case, the Supreme Court set up what is essentially a three pronged test to determine whether a criminal defendant has received effective assistance of counsel;

1. Defendant must receive competent legal assistance;

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2. Defendant must not have been prejudiced by counsel's actions; and

3. the final outcome must be fundamentally fair.

To determine whether a defendant has received competent legal assistance, the standard for the measure of attorney performance "remains simply reasonableness under prevailing professional norms." Strickland at 2065. The judicial scrutiny of counsel's actions is to be "highly deferential." Id.

A strong presumption exists that counsel's conduct falls within the wide range of reasonable professional assistance. Defendant must overcome the presumption that counsel's actions were sound trial strategy. The Defendant must identify the acts or omissions of counsel that are alleged not to be acts of reasonable professional judgment. The Court then must determine, in light of all circumstances, whether the identified acts or omissions are outside the wide range of professionally competent assistance. Id. at 2066.

To determine whether the Defendant was prejudiced by counsel's actions, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 2067-2069. The Court is to determine whether there is a reasonable probability that, without the counsel's errors, the fact finder would have had a reasonable

doubt respecting guilt. Id. at 2069.

The ultimate focus of the inquiry is on the fundamental fairness of the proceeding. Id. "[T]he Court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id.

Each of Burnett's claims must be analyzed in light of the required elements to determine whether his sixth amendment right to effective counsel has been infringed.

Plaintiff's first claim is that failure to move for a mistrial when the opportunity arose was both unreasonable attorney conduct and prejudicial to the final result. The facts constituting the claim are that the Court granted a mistrial on motion of Burnett's counsel after the prosecution asked questions concerning another murder during cross-examination of Burnett. Counsel withdrew the motion when the Court announced that the case would not be dismissed, but in fact would continue the next day with a new jury. This action by the attorney is within the "wide range of professionally competent assistance." Id. at 2066. Further, Burnett agreed with counsel's decision when questioned by the Court:

> The Court: "The Court asks, do you waive any objection now and forever more in regard to this statement made by Mr. Baker during your cross-examination, do you waive and relinquish any complaint, regardless of what this jury may do? At this time, do you waive that, give it up?"
>
> Defendant: "Yes sir". (Transcript of jury trial p. 506.)

Plaintiff's second claim is that counsel should have submitted jury instructions concerning self-defense. The decision whether or not to submit jury instructions is within the wide range of professionally competent assistance. The Court ensured that no prejudice accrued from counsel's decision when the Court submitted its own jury instructions on self-defense; instructions that were found to be proper on appeal. United States v. Burnett, 777 F.2d 593, 597 (10th Cir. 1985). As instructions were correctly submitted to the jury, the result was not fundamentally unfair.

Plaintiff's third claim is that counsel should have submitted instructions concerning voluntary intoxication. Again, this decision by counsel is within the wide range of professionally competent assistance. And again, the Court ensured that no prejudice would result from counsel's decision by submitting its own instruction on voluntary intoxication, an instruction which has not been questioned by Defendant on appeal. No issue has been raised on the properness of the instruction, and a § 2255 habeas corpus petition is not the proper place to raise issues that should have been raised on appeal, Joe v. United States, 510 F.2d 1038 (10th Cir. 1975). Nevertheless, the Court finds no fundamental unfairness in this regard.

Plaintiff's fourth claim is that he was deprived of effective counsel when his attorney advised him to testify and failed to advise him of his Fifth amendment right not to incriminate himself. The advice to testify is again within the

wide range of professionally competent assistance. However, Burnett alleges that he was told that he had no choice but to testify, and that he was not advised of his Fifth amendment right not to testify. With the benefit of hindsight, it is obvious from a tactical standpoint that at the time, the Defendant was forced to testify. Burnett's fellow Defendant had taken the stand and effectively convicted his co-defendants. Tactically, the only hope Burnett had for exculpating himself was to testify.

Because of the seriousness of this allegation, the Court ordered trial counsel to submit, under seal, an affidavit as to this allegation.

The Court has reviewed the affidavit and finds it to be somewhat ambivalent. However in light of the entire record in the case, the Court finds Plaintiff's assertions in this regard must fail.

IT IS THEREFORE ORDERED that Plaintiff's writ of habeas corpus is denied as to all grounds.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

JHL/jch

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 16 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

PATRICK A. MULKINS, by and through his Mother and Next Friend ROSEMARY MULKINS,

Plaintiff,

vs.

THE AETNA CASUALTY & SURETY COMPANY,

Defendant.

No. 86-C-288-E

ORDER OF DISMISSAL

On this 15th day of December, 1986, upon the written application of the Plaintiff, Patrick A. Mulkins individually and by and through his Mother and Next Friend Rosemary Mulkins, and the Defendant, The Aetna Casualty & Surety Company, for a Dismissal with Prejudice as to the Complaint of Mulkins v. The Aetna Casualty & Surety Company, and all causes of action therein, and the Court having examined said Application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint, and have requested the Court to Dismiss said Complaint with prejudice, to any future action. The Court being fully advised in the premises finds said settlement is to the best interest of said Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiff, Patrick A. Mulkins, individually and by and through his Mother and Next Friend Rosemary Mulkins, against the Defendant, The Aetna Casualty & Surety Company, be and the same hereby are dismissed with prejudice to any future action.

S/ JAMES O. ELLISON

JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OKLAHOMA

APPROVALS:

DARRELL E. WILLIAMS

Attorney for the Plaintiff

JOHN HOWARD LIEBER

Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 16 1986

Jack C. Silver
U.S. DISTRICT CO

LYLE W. TURNER, JR.	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO. 85-C-640-C
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	

STIPULATION ~~FOR~~ of DISMISSAL

It is hereby stipulated and agreed that the Complaint in the above-entitled case be dismissed with prejudice, the parties to bear their respective costs, including any possible attorneys' fees or other expenses of litigation.

GEORGE L. de VERGES
Attorney at Law
Owens & McGill, Inc.
1006 First National Bank Bldg.
Tulsa, Oklahoma 74103

ATTORNEY FOR PLAINTIFF

CYNTHIA E. ROBOKOS
Attorney, Tax Division
Department of Justice
Room 5B31, 1100 Commerce St.
Dallas, Texas 75242-0599
(214) 767-0293

ATTORNEY FOR UNITED STATES

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOE W. WATASHE,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-797-C

DEFAULT JUDGMENT

This matter comes on for consideration this 15th day of ~~November~~ Dec, 1986, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Joe W. Watashe, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Joe W. Watashe, acknowledged receipt of Summons and Complaint on September 15, 1986. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant,

Joe W. Watashe, for the principal sum of $696.00, plus interest at the rate of 12.25 percent per annum and administrative costs of $.68 per month from May 3, 1984, and $.67 per month from February 1, 1985, until judgment, plus interest thereafter at the current legal rate of 5.77 percent per annum until paid, plus costs of this action.

UNITED STATES DISTRICT JUDGE

3737-000

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF OKLAHOMA

HITACHI DENSHI AMERICA, LTD., a New York corporation,	)	
Plaintiff,	)	
vs.	)	
DIVERSIFIED ELECTRONIC COMMUNICATIONS CORP. d/b/a "Delcom Corp.," an Oklahoma corporation; et al.,	)	
Defendants.	)	No. 86-C-1000C

JUDGMENT AFTER DEFAULT

The Defendants, Diversified Electronic Communications Corp. d/b/a "Delcom Corp." and Sam Pate ("Pate"), have been regularly served with process. They have failed to appear and answer the Plaintiff's Complaint filed herein. The default of Defendants, Delcom Corp. and Pate, has been entered. It appears that the Defendants, Delcom Corp. and Pate, are not infants or incompetent persons, and that the Plaintiff is entitled to judgment.

It is ORDERED, ADJUDGED and DECREED that the Plaintiff recover from the Defendants, Diversified Electronic Communications Corp. d/b/a "Delcom Corp." and Sam Pate, the sum of Fifty-Nine Thousand Two Hundred Thirty-Two and 19/100 Dollars ($59,232.19), plus interest thereon at the rate of 5.77 percent (__%) per _____, until paid, together with an attorneys' fee in the sum of One Thousand Nine Hundred Twelve and No/100 Dollars

($1,912.00), and costs in the sum of One Hundred Forty-Five and No/100 Dollars ($145.00).

Dated December ___, 1986.

H. DALE COOK

United States District Judge

Attorneys for the Plaintiff:

Stephen A. Schuller 7992
Suite 300
610 South Main Street
Tulsa, OK 74119-1224
(918) 584-1600

BL2/cjb:HJD

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MID-STATES AIRCRAFT ENGINES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 86-C-1070-C
	)	
TELEDYNE, INC., a Delaware Corporation, a/k/a Teledyne Industries, Inc.,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

The parties having reached an agreement fully resolving all issues in this action and having agreed to dismissal with prejudice of this entire action, it is hereby ordered that this action is dismissed with prejudice, each party bearing its own costs. It is further ordered that all terms by which this action was settled shall remain confidential and shall not be disclosed by the parties or their counsel to anyone.

Dated: 12-15-86

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES W. HOLT, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 86-C-878-EU
	)	
HAL W. OSWALT, et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff's having filed their Notice of Dismissal Without Prejudice, pursuant to rule 41(a) of the Federal Rules of Civil Procedure, the court finds that Plaintiff's should be permitted to dismiss their case.

It is therefore ordered that this case is dismissed without prejudice against each and every defendant.

Luther B. Eubanks
Senior United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 15 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
TEN THOUSAND NINETY-SIX DOLLARS AND THREE CENTS ($10,096.03) IN UNITED STATES CURRENCY,	)	
	)	
Defendant-in-Rem.	)	CIVIL ACTION NO. 86-C-~~699~~ 669-E

JUDGMENT OF FORFEITURE

This cause having come before this Court upon Plaintiff's Application and being otherwise fully apprised in the premises, it is hereby

ORDERED, ADJUDGED, AND DECREED that judgment be entered against the Defendant, Ten Thousand Ninety-Six Dollars and Three Cents ($10,096.03) in United States Currency, and against all persons interested in such property and that the said property be and the same is hereby forfeited to the United States of America.

/s/ James O. Ellison
UNITED STATES DISTRICT JUDGE

APPROVED:

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

CATHERINE J. HARDIN
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEC 15 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

AMERICAN STORES PROPERTIES, INC.,	)	
Plaintiff,	)	
vs.	)	No. 85-C-774-E
M. H. COLEMAN d/b/a RAINBOW HOMES, et al.,	)	
Defendants.	)	

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within ninety (90) days that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this judgment by United States mail upon the attorneys for the parties appearing in this action.

DATED this 15TH day of December, 1986.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRUCE BONNETT, Plaintiff,	)	
vs.	)	No. 85-C-1055-C
OSTRANDER, SUGG & YORK, INC., STANFIELD & O'DELL, TOWN & COUNTRY BANK, CHARLES WRAY, WESLEY THOMPSON, RICHARD PALMER, and STEVE and VENITA WELTER, Defendants.	)	

ORDER OF DISMISSAL

NOW ON THIS 15th day of December, 1986, the Court has for its consideration the Stipulation for Dismissal jointly filed in the above-styled and numbered cause by plaintiff, Bruce Bonnett and defendants, Town and Country Bank and Fred P. Leiding, Sr. Based upon the representations and requests of the parties, as set forth in the foregoing Stipulation, it is

ORDERED that plaintiff's Amended Complaint and claims against defendants, Town and Country Bank and Fred P. Leiding, Sr., be and the same are hereby dismissed with prejudice. It is further

ORDERED that the defendant Town and Country Bank's counterclaim and claim for relief against plaintiff, Bruce Bonnett, be and the same are hereby dismissed with prejudice. It is further

ORDERED that each party shall bear its own costs.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

APPROVED:

Stephen Jones, Esq.
JONES, BLAKLEY & JENNINGS
Suite 1100, Broadway Tower
P.O. Box 472
Enid, OK 73702

Attorneys for Plaintiff,
Bruce Bonnett

Joel L. Wohlgemuth
NORMAN, WOHLGEMUTH & THOMPSON
909 Kennedy Building
Tulsa, OK 74103

Attorneys for Defendants,
Town and Country Bank and
Fred P. Leiding, Sr.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE TIMBERCREST COMPANIES, INC., an Oklahoma corporation, Plaintiff,	)	
vs.	)	Case No. 86-C-537-B
HINES/TULSA INDUSTRIAL, LTD., and HINES/TIMBERCREST, LTD., Defendants.	)	

STIPULATION OF DISMISSAL

Plaintiff THE TIMBERCREST COMPANIES, INC. by and through its attorneys of record Morrel & West, Inc. by Frank R. Patton, Jr. and Defendants Hines/Tulsa Industrial, Ltd. and Hines/Timbercrest, Ltd., by and through their attorneys of record Jones, Givens, Gotcher, Bogan & Hilborne, by Stephen W. Ray hereby stipulate that the above styled case be and the same is hereby dismissed with prejudice.

Respectfully submitted,

MORREL & WEST, INC.

BY: Frank R. Patton

FRANK R. PATTON, JR., OBA #6961
1717 S. Boulder, Suite 800
Tulsa, Oklahoma 74119
(918) 592-2424

Attorneys for The Timbercrest Companies, Inc.

JONES, GIVENS, GOTCHER, BOGAN & HILBORNE

BY: Stephen W. Ray

STEPHEN W. RAY
3800 First National Tower
Tulsa, Oklahoma 74103

Attorneys for Hines/Tulsa Industrial, Ltd. and Hines/Timbercrest, Ltd.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM L. EAVES, and PATRICIA J. EAVES, individually, and as husband and wife,	)	
Plaintiffs,	)	
v.	)	No. 86-C-53-B
TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY, a foreign insurance corporation,	)	
Defendant.	)	

J U D G M E N T

In keeping with the Order of the Court affirming the Findings and Recommendations of the Magistrate sustaining the defendant's motion for summary judgment, Judgment is hereby entered in favor of the defendant, Transamerica Occidental Life Insurance Company, and against the plaintiffs, William L. Eaves and Patricia J. Eaves, on said plaintiffs' claim for insurance benefits; and the costs of the action are assessed against the plaintiffs.

DATED this 12th day of December, 1986.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANTHONY ALPHONSO LITTLEJOHN,)
)
Plaintiff,)
)
v.) No. 85-C-519-B
)
DENNY'S RESTAURANT,)
)
Defendant.)

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby entered in favor of the defendant, Denny's Restaurant, and against the plaintiff, Anthony Alphonso Littlejohn, on plaintiff's claim,with costs to be assessed against the plaintiff. The parties are to pay their own respective attorney's fees.

DATED this 12 day of December, 1986.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ASHLAND EXPLORATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 86-C-881-E
	)	
SAMSON RESOURCES COMPANY,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW the Plaintiff, Ashland Exploration, Inc., and the Defendant, Samson Resources Company, and hereby file this Stipulation of Dismissal Without Prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

DATED this 11th day of December, 1986.

Richard D. Koljack Jr.

Richard D. Koljack, Jr.
GABLE & GOTWALS
2000 Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201

ATTORNEYS FOR PLAINTIFF,
ASHLAND EXPLORATION, INC.

Jack A. Canon
Mary Victoria Dycus
Samson Plaza
Two West Second Street
Tulsa, Oklahoma 74103
(918) 583-1791

ATTORNEYS FOR DEFENDANT, SAMSON
RESOURCES COMPANY

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing instrument was mailed, postage prepaid, on the 11th day of December, 1986, to Richard D. Koljack, Jr. of Gable & Gotwals, 2000 Fourth National Bank Building, Tulsa, Oklahoma 74119.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN M. GARRETT,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-834-E

ORDER OF DISMISSAL

Now on this 12th day of December, 1986, it appears that the Defendant in the captioned case has not been located within the Northern District of Oklahoma, and therefore attempts to serve him have been unsuccessful.

IT IS THEREFORE ORDERED that the Complaint against Defendant, John M. Garrett, be and is dismissed without prejudice.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEC 12 1986

Jack C. Silver
U.S. DISTRICT CO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN P. JOHNSON,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-793-E

ORDER OF DISMISSAL

Now on this 12 day of December, 1986, it appears that the Defendant in the captioned case has not been located within the Northern District of Oklahoma, and therefore attempts to serve him have been unsuccessful.

IT IS THEREFORE ORDERED that the Complaint against Defendant, John P. Johnson, be and is dismissed without prejudice.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PATRICIA MAYBERRY,	)	Dec 12, 1986
Plaintiff,	)	
vs.	)	No. 86-C-349-C
KWIKSET CORPORATION,	)	
Defendant.	)	

JOINT STIPULATION AND ORDER
FOR DISMISSAL WITH PREJUDICE

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, Plaintiff, Patricia Mayberry, individually and by and through her attorney of record, Mark O. Thurston, and Defendant, by and through its attorney of record, Pray, Walker, Jackman, Williamson & Marlar, hereby stipulate to dismiss the above-styled action with prejudice. Each party shall bear its own respective costs and attorney's fees.

HONORABLE ~~THOMAS R. BRETT~~ H. DALE COOK
JUDGE FOR THE UNITED STATES
DISTRICT COURT

APPROVED:

Patricia Mayberry

Mark O. Thurston
5200 South Yale
Suite 100
Tulsa, Oklahoma 74135
ATTORNEY FOR PATRICIA MAYBERRY

Randall G. Vaughan
Pray, Walker, Jackman,
Williamson & Marlar
900 Oneok Plaza
Tulsa, Oklahoma 74103
ATTORNEY FOR KWIKSET CORPORATION

Entered

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES E. HOPKINS,

Plaintiff,

vs.

VETERANS ADMINISTRATION REGIONAL OFICE, MUSKOGEE, OKLAHOMA, V. A. OUTPATIENT CLINIC, and DR. LEE,

Defendants.

No. 86-C-688-E

DEC 1 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for hearing before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff Charles E. Hopkins take nothing from the Defendants Veterans Administration Regional Office, Muskogee, Oklahoma, V. A. Outpatient Clinic, and Dr. Lee, that the action be dismissed on the merits, and that the Defendants Veterans Administration Regional Office, Muskogee, Oklahoma, V. A. Outpatient Clinic and Dr. Lee recover of the Plaintiff Charles E. Hopkins their costs of action.

DATED at Tulsa, Oklahoma this 12th day of December, 1986.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES E. HOPKINS,

Plaintiff,

vs.

VETERANS ADMINISTRATION REGIONAL OFFICE, MUSKOGEE, OKLAHOMA, et al.,

Defendants.

No. 86-C-688-E

ORDER

The Court has before it its consideration the motion for judgment by default, the application for Plaintiff of entry of default judgment, and the motion of Plaintiff to amend portion of motion for judgment by default. Plaintiff's motion to amend his motion for judgment by default is granted, but Plaintiff's motion for judgment by default and application for entry of default judgment must be denied under Rule 12(a) of the Federal Rules of Civil Procedure. The United States or an officer thereof is accorded sixty (60) days after service in which to answer. The Defendant's motion to dismiss was filed within sixty (60) days after August 11, 1986. Accordingly, there was no default by the Defendant Veterans Administration Regional Office, and the entry of default by the Clerk was in error.

The Court also has for its consideration the motion to dismiss for failure to state a claim upon which relief can be granted which was filed by the Defendant. Plaintiff's claim is that the Veterans Administration abused its administrative

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discretion in denying his claim that it improperly evaluated his lower back pain, pain in his right groin area, and pain attributable to a previous appendectomy. The Defendant argues that this Court is without jurisdiction to review the decision of the Veterans Administration regarding benefits for service connected disability.

38 U.S.C. §211(a) provides as follows:

> On or after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under Chapter 37 of this title, the decisions of the administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

It is well established that this section prevents judicial review of decisions of the Administration on individual claims. Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980).

Judicial review under the Administrative Procedures Act, 5 U.S.C. §701, et seq. is foreclosed explicitly under the statute which provides that the Administrative Procedures Act applies except to the extent that statutes preclude judicial review of agency action as committed to agency discretion by law. 5 U.S.C. §701(a). Thus, this Court is without jurisdiction to entertain Plaintiff's action for review of internal decisions of the Veterans Administration with regard to his service connected disability claims. Furthermore, because the Court is without jurisdiction, it would be futile to allow Plaintiff to amend his

complaint to include a claim for aggravation of his nervous condition.

Accordingly, Plaintiff's motion and brief to amend dated July 29, 1986 must be denied, and Defendant's motion to dismiss must be granted.

IT IS THEREFORE the order of this Court that Plaintiff's application to amend his motion for default judgment is granted, but Plaintiff's motion for default judgment and application for entry of default judgment are denied. It is the further order of this Court that Plaintiff's motion to amend his complaint must be denied on the basis of futility, and Defendant's motion to dismiss for failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction must be granted.

DATED this 11TH day of December, 1986.

JAMES O ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD H. FOSTER, Plaintiff,	)	
v.	)	No. 84-C-740-BT
JOHN VITULLO and JOSEPH ALEXANDER, Defendants.	)	

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment for an attorneys' fee award is hereby granted the plaintiff, Richard H. Foster, and against the defendants, John Vitullo and Joseph Alexander, in the total amount of Twenty Thousand One Hundred Fifty and 50/100 Dollars ($20,150.50), and interest thereon at the rate of 5.77% per annum from this date. FURTHER, Judgment is awarded the plaintiff, Richard H. Foster, against said defendants in the sum of One Thousand Five Hundred Thirteen Dollars ($1,513.00), for reimbursable expenses incurred.

DATED this 12 day of December, 1986.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	DEC 1 1 1986
vs.	)	Jack C. Silver, U.S. DISTRICT COURT
DAVID K. REYNARD, Defendant.	)	CIVIL ACTION NO. 86-C-616-B

ORDER OF DISMISSAL

Now on this 11th day of December, 1986, it appears that the Defendant in the captioned case has not been located within the Northern District of Oklahoma, and therefore attempts to serve him have been unsuccessful.

IT IS THEREFORE ORDERED that the Complaint against Defendant, David K. Reynard, be and is dismissed without prejudice.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIDGEPORT MACHINES
DIVISION OF TEXTRON INC.,
a Delaware corporation,

Plaintiff,

vs.

MARSHALL SUPPLY & EQUIPMENT
CO., an Oklahoma corporation,
and MARSUCO-TEXAS, INC.,
a Texas corporation,

Defendants.

No. 83-C-156-B

DEC [illegible]

Jack C. [illegible]
U.S. DIST[illegible]

ORDER

The Court has considered the parties' Joint Application to Administratively Close Entire Case Pending Completion of Related Bankruptcy Proceedings, and finds that it should be GRANTED.

IT IS THEREFORE ORDERED that this matter be administratively closed until sixty (60) days following completion of the bankruptcy of defendant Marshall Supply and Equipment Company. Any party shall have the right to move to reopen this matter for good cause shown.

S/ THOMAS R. BRETT
United States District Judge

This 11th day of December, 1986.

6282F/MRP
12/08/86

Entered

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEC 11 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

CHERYL ANN HOWARD,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE,

Defendant.

No. 86-C-828-E

JUDGMENT

This action came on for hearing before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Plaintiff Cheryl Ann Howard take nothing from the Defendant State Farm Mutual Automobile Insurance, that the action be dismissed on the merits, and that the Defendant Sate Farm Mutual Automobile Insurance recover of the Plaintiff Cheryl Ann Howard its costs of action.

DATED at Tulsa, Oklahoma this 11TH day of December, 1986.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELVIN CHAD MAHORNEY, Petitioner,	)	
v.	)	86-C-642-E
TED WALLMAN, Respondent.	)	

ORDER

Petitioner Melvin Chad Mahorney's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 is now before the court for determination. Petitioner was convicted of First Degree Rape, After Former Conviction of a Felony, in the District Court of Tulsa County, Oklahoma, Case No. CRF-80-1042. He was sentenced to fifty-one years of imprisonment. The Oklahoma Court of Criminal Appeals affirmed petitioner's conviction and sentence in a published opinion, Mahorney v. State, 664 P.2d 1042 (Okl.Cr. 1983). His application for post-conviction relief was denied by the trial court and such denial was affirmed by the criminal appellate court on May 20, 1985, Case No. PC-85-286. Respondents concede that petitioner has exhausted his available state remedies with respect to the claims presented in his application for federal relief.

Petitioner seeks federal habeas relief based upon the following grounds: (1) he was denied effective assistance of counsel on his direct appeal; (2) the trial court denied petitioner due process and deprived him of a fair trial by the following trial errors: (a) allowing improper arguments by

prosecutor regarding the presumption of innocence, (b) allowing prosecutor to repeatedly offer evidence that petitioner did not deny his guilt after he was arrested, (c) allowing improper prosecutorial argument regarding other crimes, and (d) allowing the prosecutor to make prejudicial attacks on petitioner's character; (3) ineffective assistance of trial counsel.

The effectiveness of counsel is to be judged by a two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must show "that counsel's representation fell below an objective standard of reasonableness", 466 U.S. at 687-688, and that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. In reviewing counsel's performance "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." Id. at 689. Additionally, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. Therefore, in order to constitute ineffective assistance of counsel under the Sixth Amendment, counsel's performance must have been prejudicial to the defense. Id.

Petitioner in this case contends that he was denied effective assistance of appellate counsel because he failed to raise two issues on appeal which petitioner felt should have been raised. The first of these issues was the trial court's over-

ruling of a motion to produce records concerning police reports made by the victim concerning her ex-husband and boyfriends. Petitioner claims such information would have exonerated him from the criminal charges against him. The other issue not raised on appeal was whether petitioner was denied his rights under the confrontation clause of the Sixth Amendment by the trial judge's ruling that petitioner could not remain in the courtroom while the victim's eight-year old daughter testified.

The Magistrate cannot say that the failure to raise these issues on appeal caused the performance of petitioner's appellate counsel to fall below an objective standard of reasonableness. Counsel presented extensive argument on petitioner's behalf. The appropriate issues for appeal is a matter to be determined by counsel after careful consideration. Likewise, Mahorney has made no showing that but for the alleged errors of his appellate counsel the result of his appeal would have been different. Under Strickland v. Washington, supra, petitioner's claim of ineffective assistance must fail.

As his second ground petitioner claims that he was denied due process by four alleged trial errors. Claims of state procedural or trial errors are not cognizable in a federal habeas action unless such errors deprived the petitioner of fundamental constitutional rights. Brinlee v. Crisp, 608 F.2d 839 (10th Cir. 1979).

The first alleged trial error concerns remarks made by the prosecutor during voir dire of the jury. The challenged statements were: "The presumption of a person being innocent was

designed to protect those persons who are, indeed, not guilty of a crime." .... "But was not intended to let those who are guilty escape justice." (Tr. 58-59) During closing argument the prosecutor again referred to the presumption of innocence, stating:

> .... I submit to you at this time, under the law and under the evidence, that that presumption has been removed, that that presumption no longer exists, that that presumption has been removed by evidence and he is standing before you now guilty. That presumption is not there any more.

Improper prosecutorial argument will not warrant federal habeas relief unless the conduct complained of "made [petitioner's] trial so fundamentally unfair as to deny him due process." Donnelly v. DeChristoforo, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d, 431, 438 (1974). A review of the trial transcripts shows that the evidence against petitioner was overwhelming. In light of the entire proceedings it is clear that the prosecutor's comments in no way rendered petitioner's trial unconstitutional.

As the second alleged trial error, petitioner claims that the trial court erroneously allowed the prosecutor to elicit testimony from witnesses and state in his closing argument to the jury that petitioner did not deny his guilt after he was arrested and confronted with the prosecutrix at the scene. The Court of Criminal Appeals did not consider this claim because it found that petitioner had not preserved the issue for appeal. A thorough review of the record indicates that the question of whether or not petitioner had said anything to the prosecutrix or

had in any way denied he was guilty after the arrest was asked six times during the course of the trial and was again brought up during the prosecution's closing argument. (Tr. 138, 140-141, 181, 182-183, 192, 276, 321) On three of these occasions (Tr. 138, 181, 276), petitioner raised no objection to the question. To comply with the Oklahoma contemporaneous objection rule, petitioner would have had to make an objection each time the question was asked and request the court to admonish the jury to disregard the witness's response. 22 O.S. 1971 §861; Hill v. State, 589 P.2d 1073 (Okla.Crim. 1979); Webb v. State, 586 P.2d 78 (Okla.Crim. 1978). Because petitioner did not comply with the contemporaneous objection rule, federal review of this issue is precluded unless petitioner can show "cause" for his failure to object and actual "prejudice" resulting therefrom. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). No cause or prejudice being shown, this issue will not trigger habeas relief. Id.

In closing arguments counsel may argue all reasonable inferences that may be drawn from the evidence. See, United States v. Hooks, 780 F.2d 1526, 1534 (10th Cir. 1986); United States v. Nolan, 551 F.2d 266, 274 (10th Cir. 1977); United States v. Doyle, 771 F.2d 250, 258 (7th Cir. 1985). The closing remarks mentioning petitioner's failure to speak to the victim when he was arrested in her living room was a proper comment on the evidence adduced at trial. Petitioner himself, without objection from defense counsel, testified that he said nothing to

the victim when he was arrested and taken from her house. The State prosecutor's argument did not render petitioner's trial "unfair". Donnelly v. DeChristoforo, supra.

The third alleged trial error involved the trial court's allowing the State to infer that petitioner had either committed or attempted to commit other crimes. Petitioner argues that by characterizing petitioner's conduct as "skulking around the neighborhood" and "trying to find a way into another person's home" the prosecutor accused petitioner of being a criminal character.

Federal law proscribes the use of evidence of other crimes, wrongs or acts to prove that a person has a criminal character and acted in conformity therewith. Federal Rule of Evidence 404(b); United States v. Biswell, 700 F.2d 1310 (10th Cir. 1983); Brinlee v. Crisp, supra. In this case, however, there was only an implication of other crimes. On one occasion the trial judge sustained an objection to the use of the term "skulking" and admonished the jury to disregard it. Generally, the trial court's instruction to the jury to disregard a question or answer will cure any prejudice which would otherwise result. United States v. Bernes, 602 F.2d 716 (5th Cir. 1979). In light of the trial record as a whole and the strong evidence against petitioner, these statements were not so prejudicial as to deny petitioner due process. See, United States v. Kapnison, 743 F.2d 1450, 1460 (10th Cir. 1984).

As his fourth claim of trial error petitioner asserts that the trial judge improperly allowed the prosecution to attack his

character. The first such "attack" occurred during the cross-examination of petitioner's brother where the prosecutor asked whether it would have been unusual for petitioner to have had troubles with women. Petitioner's brother responded, "Sometimes yes, he had women problems." (Tr. 212-213) The trial judge ruled that this question was not beyond the scope of proper cross-examination.

The admissibility of evidence in a state criminal proceeding is within the sound discretion of the trial court and will not generally be disturbed by federal court review. Brinlee v. Crisp, supra. This court cannot say that considering all the evidence and testimony the other instances of alleged prosecutorial misconduct, referring to petitioner at one point as a Good Samaritan (Tr. 234), and during closing argument as a "damn wild man" (Tr. 310), do not rise to a deprivation of due process. Therefore, under Donnelly v. DeChristoforo federal habeas corpus is not available.

Finally petitioner asserts that his trial counsel was ineffective because he allowed the court to try petitioner in a one-stage proceeding, rather than a two-stage proceeding. In this regard petitioner has wholly failed to show that his attorney's conduct did not comport with the reasonable objective standard of the profession or that counsel's conduct had a prejudical effect on the defense. Normally, in the trial of a crime after former conviction of a felony, evidence of the former felonies is not admitted during the guilt phase of the trial. However, because petitioner chose to testify, evidence of his prior convictions

was properly admitted as relevant to his credibility as a witness. The jury was instructed that they could not consider plaintiff's previous convictions in determining his guilt or innocence. (Tr. 304) Habeas relief on this claim is unavailable. Strickland v. Washington, supra.

It is therefore ordered that petitioner's application for habeas corpus be and is hereby denied.

Dated this 11th day of December, 1986.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 11 1986

Jack C. Silver, Clerk
U.S. DISTRICT COURT

THE TRIDENT COMPANY, a Texas Corporation,

Plaintiff,

vs.

DAVIS GREAT GUNS LOGGING, INC., a Kansas Corporation,

Defendant.

Case No. 86 C 718 B

JOURNAL ENTRY OF DISMISSAL WITH PREJUDICE

NOW, on this 11th day of December, 1986, the above matter comes on for hearing upon the joint motion of the captioned parties to dismiss the above and foregoing action with prejudice. The plaintiff appears by and through its attorney of record, Jerry Williams of Jenks, Oklahoma. The defendant appears by and through its attorney of record, W. Thomas Gilman of Redmond, Redmond, O'Brien & Nazar, Wichita, Kansas. There are no other appearances.

WHEREUPON, counsel for the plaintiff announces to the Court that the matter has been settled and acknowledges receipt of the funds from the defendant to settle said case. Whereupon, counsel for the plaintiff advises the Court that he has agreed to dismiss the above and foregoing matter with prejudice as a condition to accepting the aforesaid settlement funds and, therefore, moves the Court for a dismissal of the above and foregoing matter with prejudice. Whereupon, counsel for the defendant joins in said motion.

LAW OFFICES
Redmond, Redmond O'Brien & Nazar
331 EAST DOUGLAS
WICHITA, KANSAS 67202-3405
(316) 262-8361

THE COURT, having heard the statements of counsel, reviewed the file, and being duly and fully advised in the premises, finds that the above and foregoing matter should be dismissed with prejudice as the parties thereto have settled the dispute forming the basis for this action.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the above and foregoing matter be and hereby is dismissed with prejudice and that the parties bear their costs as they have been incurred respectively.

IT IS SO ORDERED.

DISTRICT COURT JUDGE

APPROVED BY:

JERRY WILLIAMS
Counsel for Plaintiff

PREPARED BY

REDMOND, REDMOND, O'BRIEN & NAZAR

By
W. Thomas Gilman
Counsel for Defendant

LAW OFFICES

Redmond, Redmond O'Brien & Nazar

330 EAST DOUGLAS
WICHITA, KANSAS 67202-3405
(316) 262-8361

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIDGEPORT MACHINES DIVISION OF TEXTRON INC., a Delaware corporation,	)	
Plaintiff,	)	
vs.	)	No. 83-C-156-B
MARSHALL SUPPLY & EQUIPMENT CO., an Oklahoma corporation, and MARSUCO-TEXAS, INC., a Texas corporation,	)	
Defendants.	)	

DEC 11 1986

Jack C. Silver
U.S. DISTRICT CLERK

ORDER

The Court has considered the parties' Joint Application to Administratively Close Entire Case Pending Completion of Related Bankruptcy Proceedings, and finds that it should be GRANTED.

IT IS THEREFORE ORDERED that this matter be administratively closed until sixty (60) days following completion of the bankruptcy of defendant Marshall Supply and Equipment Company. Any party shall have the right to move to reopen this matter for good cause shown.

United States District Judge

This 11th day of December, 1986.

6282F/MRP
12/08/86

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

OVID L. PATTERSON and NORMA J. PATTERSON,	)	
Plaintiffs,	)	
vs.	)	No. 85-C-909-B
FIBREBOARD CORPORATION, et al.,	)	
Defendants.	)	

ORDER OF DISMISSAL

Now on this 11th day of December, 1986, the Court being advised that a compromise settlement having been reached between the plaintiffs and the named defendants, and those parties stipulating to a dismissal with prejudice, the Court orders that the captioned case be dismissed with prejudice as to the defendants KEENE CORPORATION, OWENS-ILLINOIS, INC., OWENS-CORNING FIBERGLAS CORPORATION, FIBREBOARD CORPORATION, EAGLE-PICHER INDUSTRIES, INC., PITTSBURGH-CORNING CORPORATION, CELOTEX CORPORATION, H. K. PORTER COMPANY, NATIONAL GYPSUM COMPANY, ROCK WOOL MANUFACTURING COMPANY, CERTAINTEED CORPORATION, FLINTKOTE COMPANY and FLEXITALLIC GASKET COMPANY.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE